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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1974

No. 74 - 5822

CHARLES HAMPTON,

Petitioner,

- vs -

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

DAVID A. LANG
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Counsel for Petitioner

January 8, 1975

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PETITION FOR A WRIT OF CERTIORARI TO THE
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The Petitioner, Charles Hampton, respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit entered on December 11, 1974.

OPINIONS BELOW

The opinion of the Eighth Circuit not yet reported, appears in the Appendix, hereto.

JURISDICTION

The judgment of the Court of Appeals was entered on December 11, 1974. This petition for Certiorari was filed within 30 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254 (1).

QUESTION PRESENTED

1. Whether the Due Process Clause of the Fifth Amendment forbids the conviction of a defendant for selling contraband, if the contraband sold by the defendant was supplied by the Government.

STATEMENT OF THE CASE

After a jury trial in the United States District Court for the Eastern District of Missouri, petitioner was convicted on two counts charging him with distributing heroin in violation of 21 U.S.C. §841 (a) (1). He was sentenced to five years imprisonment and a three-year special parole term on each of the two counts. The imposition of sentence was suspended and the defendant was placed on probation for five years; said probation conditioned upon defendant's remaining in the custody of the North Carolina prison system during the period of his probation. The Court of Appeals affirmed the conviction in all respects.

At the trial, the Government introduced the tesitmony of five witnesses in the case in chief and three witnesses in rebuttal. The defendant introduced the testimony of four witnesses, and he also testified. By agreement of the parties, the testimony of the defendant's other witnesses was not before the Court of Appeals for consideration.

A number of the important facts of this case are in dispute. The following view of the facts may, however, be drawn from the testimony of all the witnesses, but particularly that of the petitioner (hereinafter referred to as the defendant).

The defendant testified that soon after he moved to St. Louis with his common-law wife and four-year-old son, he began to frequent a lounge in his neighborhood called the Pub Bar and Grille. At the Pub, a man who introduced himself as "James Gray" struck up an acquaintance with him. (Tr. 48). Soon he and "Gray" became close friends, based on their mutual

acquaintances in Chicago and their skill at playing pool. (Tr. 48, 118). Hampton was later to learn that "James Gray" was, in reality, Jule Hutton, a Special Employee of the Drug Enforcement Administration of the United States Government. (Tr. 53). Hutton had been involved "as a special agent or special employee of the government" in "more" than "80 or 90 narcotics transactions." (Tr. 54).

Hutton, aware that the defendant and his family were in serious financial straits, proposed a plan whereby they could both make some "clean" money. (Tr. 119, 147). Under this plan, defendant testified, Hutton would obtain a quantity of counterfeit narcotics for sale to some gullible acquaintance of Hutton's in town from Colorado. (Tr. 121). This substance would be obtained, Hutton told Hampton, from a friend of Hutton's who worked in a pharmacy (Tr. 121), and the substance thus obtained would simulate heroin in every apparent respect (Tr. 121, 122, 124, 128, 137, 138).

Defendant testified at trial that Hutton did subsequently deliver such a substance to him on or about February 25, 1974. At that time, defendant testified, Hutton handed him a foil-wrapped package containing the substance that Hampton, soon after, sold to Special Agent Terry C. Sawyer. (Tr. 130-131). During that transaction on February 25, 1974, Special Agents Sawyer and McDowell initiated the making of arrangements for another such transaction, to be consumated the following night, February 26, 1974. (Tr. 132).

Defendant further testified that again, on or about February 26, 1974, Jule Hutton delivered to him a quantity of a substance that he sold later that evening to Special Agent Sawyer. (Tr. 139). At that time, defendant testified, Hutton delivered two small tinfoil packets to him at Hutton's apartment. (Tr. 139). Both Hutton and Hampton participated in the preparation of one large package of the substance from the two small tinfoil packets.

(Tr. 140). Hampton sifted the mixture through a nylon stocking, and Hutton wrapped the substance in tinfoil. (Tr. 140).

Hutton, on direct examination, testified that he again accompanied the defendant to the agents' car, (Tr. 43), and that he got into the rear seat, and the defendant into the front. (Tr. 43). After Hampton passed the tinfoil packet of the substance to Special Agent Sawyer, Sawyer got out of the automobile, and Special Agent McDowell announced that he and Sawyer were narcotics agents and that both Hutton and the defendant were under arrest. (Tr. 44).

In chambers after closing arguments, the defense moved for a special jury instruction on the defense of entrapment which reads in relevant part:

> The defendant asserts that he was a victim of entrapment as to the crimes charged in the indictment.
>
> If you find that the defendant's sales of narcotics were sales of narcotics supplied to him by an informer in the employ of or acting on behalf of the government, then you must acquit the defendant because the law as a matter of policy forbids his conviction in such a case.
>
> Furthermore, under this particular defense, you need not consider the predisposition of the defendant to commit the offenses charged, because if the governmental involvement through its informer reached the point that I have just defined in your own minds, then the predisposition of the defendant would not matter.

Petitioner's motion for the above requested instruction was denied, and the Court gave no jury instruction whatsoever on entrapment.

The Court of Appeals upheld petitioner's conviction for distribution of heroin despite his assertion that he could not be convicted as a matter of law, regardless of his predisposition to commit the offenses, when the heroin he sold was provided him by a paid government informer. Petitioner further asserted before the Court of Appeals that since there was a factual dispute as to his source of supply of the heroin, his requested instruction should have been given to the jury to let them decide that factual issue.

The Court of Appeals stated clearly that its reason for rejecting petitioner's argument was that it believed this Court's opinion in U.S. v. Russell, 411 U.S. 423 (1973)foredosed it from considering any theory of entrapment founded on other than defendant's lack of predisposition, and since it was conceded by petitioner's counsel that he was predisposed to commit the offenses, he was entitled to no other entrapment instruction. (App., infra., at pp. 5,7).

REASONS FOR GRANTING THE WRIT

The issue in this case is of fundamental importance for determining the constitutional methods that law enforcement officials can properly use to detect victimless crimes. This Court specifically recognized in Russell, infra, that some conduct of law enforcement officials may be so "outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction," but held that on the facts before it, the government's conduct did not reach this point. (411. U.S. 431-432).

In Russell, this Court held that where an undercover narcotics agent who was investigating the defendant for illicitly manufacturing a drug, offered him an essential ingredient which, although difficult to obtain, was legal to possess and was obtainable, this did not constitute entrapment as a matter of law. Thus this Court in Russell left open the question of what types of law enforcement conduct might be sufficiently outrageous to bar prosecution for a case by case adjudication.

However, both prior and subsequent to the decision in Russell, there has been a growing body of authority that universally condemned one particular law enforcement practice - that of supplying the very contraband to the defendant that was the subject of the offense with which he was charged. U.S. v. Bueno, 447 F. 2d 903 (5th Cir. 1971); U.S. v. Dillett, 254 F. Supp.

980 (S.D.N.Y. 1966); Greene v. U.S. 454 F.2d 783 (9th Cir. 1971); U. S. v. Oquendo, 490 F. 2d. 161 (5th Cir. 1974); State v. Bocelli, 105 Ariz. 405, 467 P.2d 740 (1970); State v. Powell, 181 S.E. 2d 754 (N.C. App. 1971). Moreover, both Russell and the government suggested in their briefs before the Court in that case that a conviction may be precluded on due process grounds when the government was the sole source of an otherwise unobtainable and necessary means to the commission of an offense. (411 U.S. at 431, n. 8). Indeed, it is difficult to fathom a law enforcement practice that involves the government in the commission of a crime on a greater magnitude than supplying the sine qua non of the offense. Hence, as a practical matter, if this particular law enforcement practice is not forbidden, the dissent's foreboding in the instant case seems particularly apt:

> ...In the future, it is difficult to see how any defendant in this circuit can possible raise the due process defense which the Russell Court sought to leave open... (App., infra, P.10).

Thus, the important question raised by this case is whether the Court of Appeals is properly reading the Russell decision. The Eighth Circuit's holding in this case is in direct conflict with a post-Russell Fifth Circuit holding that Russell did not overrule that Court's prior decisions that entrapment is established as a matter of law to a charge of possessing or distributing contraband where such contraband was supplied to the defendant by a government agent or paid informer. See U.S. v. Oquendo, 490 F.2d 161 (5th Cir. 1974).

The effect of the holding of the Court of Appeals in the instant case is that anything is permissible in law enforcement as long as the defendant was willing or predisposed to commit the offense. This holding clearly goes beyond anything this Court intended in Russell, is not consistent with the rationale behind Russell, is in direct conflict with the Fifth Circuit's holding in Oquendo, and for these reasons should be reviewed by this Court.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the United States Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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January 8, 1975

Supreme Court, U. S.
FILED
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MICHAEL RODAK, JR., CLERK

APPENDIX

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-5822

CHARLES HAMPTON,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI FILED JANUARY 10, 1975

CERTIORARI GRANTED MARCH 31, 1975

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-5822

CHARLES HAMPTON,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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LIST OF RELEVANT DOCKET ENTRIES

District Court

Date	Proceedings
1974	
Mar. 11	Deft appears with David A. Lang, his atty., waives formal arraignment and enters plea of not guilty to each of Counts 1 and 2 of indictment. Deft granted 15 days in which to file contemplated motions and cause set for trial on Mar. 25, 1974. Deft. remanded to custody of the U. S. Marshal. Ct. finds deft's age is 27 yrs.
May 3	Memo of deft in support of his request for a special instruction on the defense of entrapment and in support of any motions for a judg. of acquittal made during course of his trial, fld.
May 6	Deft appears with David A. Lang, his atty., and having heretofore entered plea of not guilty to ea. of Cts. 1 and 2 of the Ind., and cause having been set for trial this day, parties announce ready. Jury empaneled and sworn and the introduction of evidence on behalf of plff is commenced and concluded. Oral motion of deft for judg. of acquittal made at close of the Govt's case and overruled. Further proceedings on trial postponed until tomorrow at 9:45 a.m.
May 7	Again comes the deft., his atty, and the jury. The introduction of evidence on behalf of deft is commenced and concluded. Rebuttal evidence on behalf of plff commenced and concluded. Surrebuttal

evidence on behalf of deft commenced and concluded. Oral motion of deft for judg. of acquittal made at close of all the evidence and overruled. After arguments of counsel and charge by the Ct., the jury retires to consider its verdict. Thereafter the jury returns into Ct its verdict finding deft Hampton guilty as charged in ea. of Cts. 1 and 2 of the Ind. On motion of deft, the jury is polled and the Members thereof individually as called ack. said verdict as their true verdict and finding herein. Imposition of sentence deferred to May 24, 1974 at 9:30 a.m. and deft remanded to custody of the U. S. Marshal.

May 14 Motion of deft for a new trial fld. Argument requested.

May 24 Deft appears with David A. Lang, his atty., for imposition of sentence under verdict returned by a jury finding deft guilty as charged in ea. of Cts 1 and 2 of the Ind. Brief of deft in support of his motion for a new trial, heretofore fld., fld., and sd. motion is overruled. Under ea. of cts 1 and 2 of Ind., deft sentenced to imprisonment for a period of 5 yrs., followed by special parole term of 3 yrs. on ea. of sd. cts, such terms to begin and run concurrently with each other, making an aggregate term of imprisonment of 5 yrs followed by special term of parole of 3 yrs as provided by T. 21, U.S.C., Sec 841(b)(1)(A). Execution of sentence imposed herein suspended and deft placed on probation for a period of 5 yrs in accordance with conditions fld and with the special condition deft remain in the custody of the North Carolina Prison System during period of his probation. Judg & Commitment fld and entered. CC to U. S. Atty., U S Marshal and Prob. Office. (Nangle, J)

June 3 Notice of appeal of deft fr. final judg of conviction of May 24, 1974 fld.

Copy of appeal sent to U. S. Atty. and deft. c/o Corr. Inst. N.C. Certified copy of appeal and 2 certified copies of Clerk's docket entries delivered to Clerk of U.S.C.A., 8th Circuit.

June 12 Marshal's return to J & C. fld. Deft. delivered to State Authorities for North Carolina 5/28/74.

June 26 Original documents requested and certified copy of Clerk's docket entries delivered to Clerk of U.S. C.A., 8th Circuit. Two additional sets delivered.

Dec. 11 Opinion and Mandate of United States Court of Appeals for the Eighth Circuit affirming judgment and commitment of District Court.

United States District Court
Eastern District of Missouri
Eastern Division

United States of America,
Plaintiff,
v.
Charles Hampton, a/k/a Michael Byers,
Defendant.
Cause No. 74 96 CR(4).

PARTIAL TRANSCRIPT OF PROCEEDINGS

PLAINTIFF'S CASE

[*30] **JULE HUTTON,**
being produced, sworn and examined in behalf of plaintiff, testified as follows:

Direct Examination

By Mr. Dye

Q. State your name, please. A. Jule Hutton.

Q. What is your occupation? A. Pre-inspector.

Q. Where do you work? A. I work at Safelite Glass.

Q. What city is that? A. Wichita, Kansas.

Q. How long have you lived in Wichita?

* Numbers appearing in brackets in text indicate page numbers of original stenographic transcript of testimony.

Mr. Lang: I can't hear the witness.

The Court: You wanted to get Mr. Hutton's occupation?

Mr. Lang: Yes, your Honor.

The Court: What is your occupation?
Is that the company you work for, S-a-l-e-l-i-t?

Mr. Dye: Safelite, your Honor.

The Witness: Yes, it is.

The Court: And your position is that of pre-inspector there.

The Witness: Pre-inspector.

Q. (By Mr. Dye) What do you do as a pre-inspector? [31] A. We make windshields. I inspect all the glass.

Q. How long have you been in that capacity? A. Approximately three weeks.

Q. Are you familiar with an individual by the name of Michael Byers, also known as Charles Hampton? A. Yes, I am.

Q. Do you see that individual in the courtroom today, please? A. Yes, I do.

Q. Would you identify him, please? A. The gentleman sitting right here with the shades on and red sweater.

Mr. Dye: May the record reflect identification, your Honor?

The Court: Yes, it so reflects.

Q. (By Mr. Dye) Directing your attention to February 25, 1974, did you have occasion to see this individual? A. Yes, I did.

Q. Did you have occasion to see an individual by the name of Terry Sawyer? A. Yes, I did.

Q. Who is Terry Sawyer? A. Special Agent for DEA, Drug Abuse Law Enforcement.

Q. I think I should backtrack a little bit and ask you **[32]** if you have ever been convicted of any felonies? A. Yes, I have.

Q. What felonies are those? A. I was convicted of burglary in 1966; I was convicted of forgery in 1973.

Q. Now, directing your attention to February 25th, you had occasion to see Agent Sawyer at that time? A. Yes, I did.

Q. Did you have occasion to talk to him on the telephone at any time? A. Yes, I did.

Q. Could you tell us about what time and what was the conversation? A. Approximately around 8:30, 8:45, late in the afternoon, I called Agent Sawyer at his home and I stated that I had met an individual by the name of Michael Byers and I had set up a heroin deal. Agent Sawyer then asked me, said, "Well, what did he have?" and I told him he had what they call a "boil", which is half a spoon, and he said, "Well, how much money do I need?" I said, "Well, I have to ask him and see." So at this time I went over to the individual known as Michael to me and asked him how much money he had to have, and he told me $155.00. I then told Special Agent Terry that he had to have $155.00.

Q. Where were you when you were making this telephone **[33]** call? A. At a tavern called The Pud on Delmar and——

Q. Is that P-u-b? A. P-u-d, d, P-u-d.

Q. P-u-d, Pud, okay. Did you have occasion to make a second telephone call that night? A. Yes, I did.

Q. What was that telephone call? A. First Agent Terry called me.

Q. I see. A. He called me back.

Q. Where did he call you? A. At the Pud Tavern.

Q. What if anything did he say? A. He told me that he had got the money together and he would meet me approximately 10:00 o'clock.

Q. And then what did you do after this telephone call? A. I then told Michael Byers that what the agent had said, that he would be here approximately 10:00 o'clock.

Q. What if anything did Mr. Byers, also known as Charles Hampton, say? A. He told me okay, and we started to playing pool for a while, and I imagine around 9:00, ten after 9:00, he left the tavern, said he would be back in a few minutes.

[34] Q. This was shortly after Agent Sawyer called you? A. Yes, it were.

Q. Approximately how long was Mr. Hampton gone? A. Approximately ten or fifteen minutes.

Q. What happened after he returned? A. After he returned he said everything was all right, and then Agent Sawyer called me again and he stated that he was down on Lindell and Kingshighway.

Q. What if anything did he say? Let me ask you this: Did you, in your previous conversation, did you determine where you might meet on that date? A. Yes, we did. That was in the first—second telephone call.

Q. Where did he say that you would meet? A. He said we would meet on Lindell and Kingshighway.

Q. What happened after this Agent Sawyer called you? What time did he call you? A. The third telephone call was around 11:00 o'clock, or quarter after.

Q. Could it have been a little earlier than that? A. Possibility.

Q. And then as a result of that telephone conversation what if anything did you do? A. I then, after I talked to him, I told him we would **[35]** be right down, I then went over and told

Michael Byers that Special Agent Terry was there, which I called him Terry.

The Court: You'll have to speak up, Mr. Hutton, so they can hear you over there.

Mr. Lang: Would you read the last question and answer?

(Whereupon, the reporter read the last question and answer.)

Q. (By Mr. Dye) What happened after your conversation with Mr. Hampton? When I say "Mr. Hampton" that also means Michael Byers, is that not correct? A. Yes.

Q. What happened after that conversation? A. Well, we then walked out of The Pud Tavern onto Delmar, where we walked up to Kingshighway and we proceeded to go east, I think it is, over to Lindell where we walked to—at first we stopped at a motel which I thought that was the street, and we found out it wasn't, then we proceeded and went on further on Kingshighway over to Lindell, where we stood on the corner for a few minutes, and I think Michael stated that he had to go get some cigarettes, and he walked into the hotel lobby. At this time Special Agent Terry and the other agent pulled up in a car. I walks over to the car and stated that he had just went into the hotel, I would go and get him.

Q. And did you in fact go in after him? **[36]** A. Yes, I did.

Q. What happened after you met him in the hotel? A. Just as I walked inside of the hotel he was going up some stairs, little step up like, and I called him. He turned around. I told him that he was here, and he in turn come on back out with me. At this time Special Agent Terry had parked on the south side of the street on the street on Kingshighway.

Q. When you say Special Agent Terry, who do you mean? What is his full name? A. Terry Sawyer.

Q. What happened then after you noticed that the agents were parking their vehicle? A. Myself and Michael walked across the street where I got into the rear seat of the passenger side and he got into the front seat on the passenger side.

Q. Was there any conversations after you got in? A. Yes, I think Michael was smoking what we call a joint, marijuana, and he stated that it was awful good stuff. At this time Special Agent Terry Sawyer asked him did he bring the package. He said, yes, he did, and he took his cap off and took out a tinfoil package.

Q. What did he do with that package? A. Well, he passed it to Special Agent Sawyer and Special Agent Sawyer attempted to open it, and started to **[37]** waste, and he told him, he said, "Wait a minute, let me do that," and Special Agent give it back to him where he opened it, and then give it back to him, Special Agent.

Q. Was there another agent in the car besides Sawyer? A. Yes, there were.

Q. Who was that, do you know? A. Special Agent Dowell, I think it is.

Q. McDowell, is it? A. McDowell.

Q. I believe you stated that the package started to waste, what do you mean by that? A. Well, the way it was wrapped, and evidently he started to open it wrong, and it just started to fall out of the package.

Q. And so then what happened after it started to fall? A. Special Agent Sawyer give it back to Michael and he opened it himself.

Q. And after Hampton opened it, what happened then? A. It was passed back to Special Agent Sawyer.

Q. Was there any further conversation at that time? A. Yes, there were. Special Agent Sawyer then passed it back to Special Agent McDowell and told him to take some and test it.

Q. What kind of a test were they talking about, if you know? **[38]** A. He was talking about a field test, marquis test.

Q. Marquis test? A. Yes.

Q. What if anything was the result of that marquis test, if you know? A. Well, Special Agent McDowell——

Mr. Lang: Your Honor, I object to this testimony as hearsay.

The Court: I'll sustain it.
Go ahead.

Q. (By Mr. Dye) After examining the substance, did Agent McDowell say anything? A. Yes, he did.

Q. What did he say? A. He said it was okay.

Q. What did he mean when he said it was okay?

Mr. Lang: Your Honor, I object to this as calling for a conclusion.

The Court: Sustained. The answer of the witness will be stricken. Go ahead.

Q. (By Mr. Dye) During the course of the conversation in the vehicle did Mr. Hampton make any reference to what the substance was that had been examined by Mr. McDowell? A. Yes, he did.

[39] Q. What did he call that, or what did he say about it? A. First he asked him how did he like that other stuff that he got, and which when you say "stuff" you mean heroin.

Q. What do you mean by "other stuff"? We've got two different dates. We're talking about February 25, 1974. After Agent McDowell examined the substance what, if anything, did he do with it? A. He passed it back to Special Agent Sawyer.

Q. Was there any discussion about the price to be paid for this substance? A. Yes, there were.

Q. What was the conversation about that? A. Special Agent Sawyer asked him could he get a better deal than the price we had agreed on, and Mr. Byers stated that the best deal he could give him was for a hundred and forty-five dollars.

Q. For a hundred and forty-five dollars? A. Yes.

Q. At that time did Agent Sawyer have any discussions with Mr. Hampton about future purchases of narcotics? A. Yes, he did.

Q. What was that conversation? A. He stated that he would like to get a larger quantity and Mr. Byers stated that he could get him some nine, I think **[40]** it were.

Q. And, if you know, what does "nine" mean? A. "Nine" means it's heroin that can be cut nine times. You can take one ounce and make nine ounces.

Q. Did Mr. Byers make any reference to how quickly he could make this transaction in the future? A. I think he stated that he had to leave town and he would be back in a couple days.

Q. Why did he have to leave town, if he said?

Mr. Lang: Your Honor, I object.

Q. (By Mr. Dye) If he said.

The Court: I'll permit it to stand. Overruled.

Q. (By Mr. Dye) Did he have an explanation as to why he had to leave town? A. I don't think he did.

Q. Was any money given to Mr. Hampton at that time? A. Yes, there were.

Q. How much was given? A. I observed special Agent Sawyer take some money out of his pocket and take off some money

and pass it to Michael Byers. In return Michael Byers passed him a bill. The denomination of the bill I can't say.

Q. Then what happened after the exchange of the money took place? **[41]** A. We then was driven back to the—Special Agent Sawyer asked if we need a ride and I think I stated yes, it was awful cold outside, and then he drove us back to Kingshighway and Delmar where during the course of the ride Special Agent asked Michael Byers was there anyway he could get in touch with him, and Michael told him, no, no way at first, and then before we reached the destination, which was Kingshighway and Delmar, he then gave him a number that he could be reached at. He pulled up to the corner, myself and Michael Byers got out of the Special Agent's car.

Q. After the money transaction was completed, was there any other discussion about future narcotics sales? A. I don't understand the question.

Q. After the money changed hands, and after you were getting ready to leave, after having been driven back up to Delmar and Kingshighway, I believe you stated? A. Yes.

Q. Was there any other discussion about any other future narcotics purchases? A. I think Special Agent Terry stated that he would get in touch with him later.

Q. Was there any reference made to the strength of any future heroin that might be obtained? A. Not that I know of.

[42] Q. And directing your attention to the very next day, which would be February the 26, 1974, did you have occasion to see Mr. Hampton on that day? A. Yes, I did.

Q. Where did you see him on that day? A. It was late afternoon, Mr. Hampton came by my room, which I was living at 706 Kingshighway. He knocked on the door. I got up and opened the door, and he told me that "those guys" had called him. He didn't state their name. He just said, "those guys" had called him. I then—he then asked me, said, "Well,

come on, go with me." I said, "Man, I'm in bed." He said, "Well, come on, go with me to take care of this buy." So, I said, "Well, okay, wait till I get dressed."

So, I then put on some clothes and washed my face and brushed my teeth and we left together.

Q. About what time did you leave, if you know? A. I don't recall. I just know it was late in the afternoon.

Q. Could it have been early evening? A. Could have been.

Q. What happened after you left? A. We then walked down Kingshighway to Maryland, I think it is, where we waited on the corner for a few minutes, and I saw the agents' car, and I just waited to see if he was going **[43]** to see it, so he never did, so I just pointed to the agent's car and myself and him walked over to the car and Special Agent McDowell got out of the car, where I got into the rear seat—well, the Special Agent got in first, and I got into the rear seat on the passenger side, and Michael Byers got into the front seat.

Q. Who was in the front seat besides Mr. Byers? A. Special Agent Sawyer.

Q. What happened after you all entered the vehicle? A. After we got into the car Special Agent Sawyer asked him did he bring the package, and Michael stated, "Yes," and he also asked him how did he like that other, and I think Special Agent McDowell stated it was okay.

Q. Now, where did he obtain—did he give the agents anything on that date? A. Yes, he did.

Q. What was it he gave them? A. Tinfoil package.

Q. Where did he get that tinfoil package from? A. Which he took out of his cap.

Q. What kind of cap was it? A. It was a black cap.

Q. Can you describe it any more than that? A. Well, it was just a regular cap with a bill on it, **[44]** black.

Q. And so what happened after he obtained the material out of his cap? A. He passed it to Special Agent Sawyer and Special Agent Sawyer in turn passed it to Special Agent McDowell where I observed him take some out of the package on a paper clip and put it into a little glass tube.

Q. Was this putting it into the glass tube, is that the same procedure that had been gone through earlier? A. Yes, it were.

Q. On the proceeding day? As a result of that test did Agent McDowell make any comments? A. Sure. After about two or three minutes he stated to Agent Sawyer it was okay, and Agent Sawyer stated that had the money but it was in the trunk of his car.

Q. And then what hapened after Agent Sawyer made that statement? A. Agent Sawyer then got out of the car and walked to the rear of his car where he opened the trunk of the car, and the next thing that I knew Special Agent McDowell told—stated that he was Federal Narcotics Agents, to stay as you were, that we were both under arrest.

Q. Now, Jule, have you ever been addicted to narcotics of any kind? **[45]** A. Yes, I have.

Q. What was that? A. Heroin.

Q. Are you addicted at this present time? A. No, I'm not.

Mr. Dye: You may inquire.

Cross-Examination

By Mr. Lang

Q. Mr. Hutton? A. Yes.

Q. When did you first arrive in St. Louis? A. I can't give you an exact date, but I can——

Q. Remember the month? A. Yes.

Q. What month was it? A. March.

Q. March of '73? A. '74.

Q. You didn't arrive in St. Louis until March of '74? A. Yes.

Q. This is March of '74, Mr. Hutton, and the transaction was alleged took place with Chuck took place in February of 1974; how do you account for that? A. I could be mistaken. I said I couldn't give you an **[46]** exact date.

Q. You don't even recall the year, correct year that you arrived in St. Louis? A. This is '74.

Q. That is correct and the transactions you just testified to allegedly occurred February the 25th and 26th of 1974. So how do you explain the fact you weren't present in St. Louis at that time? A. I could be mistaken.

Q. You have no idea in fact when you arrived in St. Louis, is that right? A. No, I don't.

Q. Any reason why you don't know when you arrived in St. Louis? A. No, there isn't.

Q. Where did you stay when you first arrived in St. Louis, whenever it was? A. At the Westgate Hotel.

Q. Were you living there alone or were you living there with anyone else? A. I was living there with a lady.

Q. What was her name? A. Mary Weekly.

Q. Where did you meet Mary Weekly? **[47]** A. Kansas City, Missouri.

Q. Did you live there with her until the time that you left St. Louis? A. No, I didn't.

Q. Who left first, you or she? A. She did.

Q. Do you know when it was that she left St. Louis? A. No, I don't.

Q. You have no idea what month that would have been? A. She was arrested while she was here, so I don't know when she left.

Q. Do you know when she was arrested? A. It was in the month of March; the date I don't know.

Q. Of 1974? A. 1974.

Q. When did you first meet Chuck Hampton, who was known to you at that time as Michael Byers? A. I don't remember the date but I know I had been in St. Louis approximately three or four days.

Q. Where did you meet him? A. At The Pud Tavern.

Q. Where is The Pud located again? A. On Delmar and Kingshighway.

Q. Did you meet anyone else who was in the company of **[48]** Chuck at that time? A. Yes, I did.

Q. Would you name those individuals, if you know? A. I only know one.

Q. What was his name? A. First name Gus.

Q. Gus, you never knew what his last name was? A. No, I don't.

Q. What was the occasion that you all happened to be together in The Pud on this particular date when you first met? A. It wasn't a special occasion; it was just that I had—I had been going to a bar around the corner there and that bar had closed and I started going to the bar around there, and Gus stated that Chuck was from Chicago, and I told him, I said, well, I had lived there once myself, and I might know some people that he knew, and we started talking.

Q. When did you first have a conversation with Chuck about setting up a drug transaction? A. Chuck made the statement that he had to have some money.

Q. When did you first have the conversation, do you recall the date? A. No, I don't.

Q. Where did it take place? **[49]** A. It took place in The Pud Tavern.

Q. Who else was present at that time if anyone? A. During the conversation there was no one present but just him and I.

Q. Was it on a weekday or weekend, do you recall that? A. I think it was a weekday.

Q. Recall what time of the day it was? A. I can only guess. It was in the afternoon.

Q. What was the subtance of that conversation? A. Chuck, he stated he had to have some money, he had just got into town and he knew some people that he could get some heroin from.

Q. What did you say to that? A. I stated, well, I knew some people that would be interested in buying some.

Q. How many people had you met in St. Louis before you met Chuck would you say? A. Quite a few.

Q. Had you approached any of them about being involved in drug transactions? A. Yes, I had.

Q. Did you approach an individual named Michael Carter? A. I don't know a Michael Carter.

Q. You don't know anybody by the name of Michael Carter? **[50]** A. No.

Q. Did you approach Gus Logwood?

The Court: Gus who?

Q. (By Mr. Lang) Did you approach an individual named Gus, an individual referred to as Gus? A. About drugs?

Q. Right. A. No, I haven't.

Q. Did you approach an individual named Kenny? A. Yes, I did.

Q. What did you say to Kenny about setting up a drug transaction?

Mr. Dye: Your Honor, I will object. I don't see how this has any relevance to our case.

(Whereupon, discussion was had off the record at the bench, in the presence but out of the hearing of the jury.)

Q. (By Mr. Lang) Incidentally, did you use any other name or were you using any other name other than Jule Hutton at the time you were in St. Louis? A. Yes, I were.

Q. What name were you using? A. James Gray.

Q. James Gray. That's not your real name, is it? A. No, it's not.

[51] Q. Jule Hutton is your name? A. Yes, it is.

Q. You testified you had two prior convictions? A. That's correct.

Q. One was in Illinois? A. Yes, sir.

Q. What was the crime you were convicted of? A. Buglary.

Q. That was in 1966? A. Yes, sir.

Q. You were also convicted of forgery in Colorado, is that right? A. Yes, sir.

Q. That was in the Fall of '73? A. Yes, sir.

Q. Did you receive a sentence on that? A. I received a fine.

Q. A fine? A. A fine.

Q. A fine? A. Yes.

Q. You didn't receive any jail time? A. No.

Q. You weren't placed on probation? A. I was placed on supervision until the fine was paid. If I paid it all at one time, then the supervision would be **[52]** discontinued.

Q. Did you receive a sentence on your conviction for burglary in Illinois in 1967? A. Yes, I did.

Q. What was that sentence? A. One to three in the Illinois State Penitentiary.

Q. Did you serve the full time? A. No, I didn't.

Mr. Dye: Your Honor, I think we've been through all this.

The Court: I will sustain the objection.

Mr. Lang: I do have some more questions along this line.

The Court: Come up here.

(Whereupon, discussion was had off the record at the bench, in the presence but out of the hearing of the jury.)

Q. (By Mr. Lang) Were you also convicted in Kansas City, Missouri, in the Circuit Court of Jackson County, Mr. Hutton? A. Yes, I were.

Mr. Dye: Your Honor, we have to determine whether it's a proper conviction.

The Court: Objection is overruled. Go ahead, Mr. Lang.

Q. (By Mr. Lang) You didn't mention that when you were **[53]** being examined by Mr. Dye on direct examination, is that right? That is a conviction that you forgot about? A. He asked me when I was convicted, but it's over with; I received two-year probation.

Q. You do have a third conviction, is that right? A. Yes, sir.

Q. What was that for? A. Misconstruction of property—destruction of property.

The Court: Was it a misdemeanor?

The Witness: It was a misdemeanor.

Mr. Dye: Your Honor, I will object and ask the court to instruct the jury to disregard it.

The Court: I will instruct the jury to disregard it and that portion will be stricken from the record and the jury thoroughly instructed to disregard it, in regards to the witness at hand.

Q. (By Mr. Lang) Do you have any other felony convictions that you recall? A. No, I don't have any.

Q. When did you first become a special employee of the United States Government? A. July 1971. I'm sorry, 1961.

Q. Where were you working or what area of the country were you working in at that time? **[54]** A. I was working in Illinois.

Q. How long have you continued your employment as a special employee of the United States Government? A. From '61 to '65.

Q. And you terminated your employment at that time? A. Yes, I did.

Q. When did you resume it again? A. June of '72.

Q. During the period that you have been a special employee of the government, how many cases involving narcotics transactions have you been involved in? A. I can't give you an exact number; I can only estimate.

Q. Could it be somewhere in the neighborhood of 80 or 90 cases? A. More.

Q. Didn't you also work as a special agent at Omaha, or special employee for the government at Omaha? A. Yes, I did.

Q. And also Wichita, Kansas? A. Yes, I did.

Q. Didn't you testify in about 17 or 18 cases in Omaha, Nebraska? A. Yes, I did.

Q. And you are receiving compensation for your services **[55]** from the government? A. I'm paid at the rate of $25.00 per day, per diem.

Q. Doesn't matter whether or not you participate in the conviction of an individual, you're just on a standard salary, is that right? A. No, I'm not on a standard salary. I'm paid $25.00 per day, per diem.

Q. What do you mean by that? A. I mean if no cases are made I still make the $25.00 per day, per diem.

Q. If a case is made do you get anything in addition? A. I still makes the same thing.

Q. Now, during what period of time that you worked—let's take the first period of time, I think you said 1960 to '65? A. Yes.

Q. You were working for the government, you were using drugs, is that right? A. At the time.

Q. You were addicted to heroin? A. Yes, I were.

Q. What was the source of your supply of heroin at that time?

Mr. Dye: Your Honor, I'll object to that.

The Court: I'll sustain the objection. I think **[56]** that's far beyond the scope of this trial.

Mr. Dye: Totally irrelevant.

Q. (By Mr. Lang) When did you last use drugs? A. '72.

Q. 1972; you have not used any heroin during the period of time that you were in St. Louis, is that right? A. No, I have not.

Q. On February the 26th, the date that you testified that Chuck was involved in the second drug transaction with you, did you receive any money from Chuck on that day? A. No, I did not.

Q. Now, I think you testified that on February the 26th, the date of the second drug transaction, that Chuck came by your hotel room, is that right? A. Yes, he did.

Q. That was sometime either in the late afternoon or evening? A. Yes.

Q. And when did you leave your room? A. I can't give you an exact time.

Q. About how long after his arrival did you leave? A. Approximately 10 or 15 minutes because he kept telling me he was in a hurry.

Q. Is that the first time you had seen Chuck on that day? **[57]** A. Yes, it were.

Q. You had not seen him at all prior to the time he entered your hotel room late that afternoon, is that right? A. Not that I recall.

Q. When you left that room, you were going to make this sale of heroin to Agent Sawyer, is that right? That was the purpose of your leaving? A. The purpose of my leaving, I didn't want to go in the first place, he asked me, said, "Come on, go with me to make this deal," and I first stated, no, I didn't want to go, I was in bed. He told me, "I don't think I could recognize the people."

Q. Had you been in bed all day on the 26th? A. I had just went to bed. I had been up all night.

Q. Where had you been prior to going to bed? A. Gambling.

Q. Where were you gambling? A. On Washington and—oh, it's around 5700 block on Washington.

Q. Did you ever have a conversation at Chuck's apartment where Chuck was staying in regard to setting up one of these drug transactions? A. No.

Q. Had you ever been to Chuck's apartment? A. Yes, I had.

[58] Q. How many times had you been there? A. I don't know how many, numbers of times. I went there several times. Him and I smoked marijuana together.

Q. During the several visits that you had at his apartment, you never discussed setting up any drug transactions? A. No.

Q. You don't consider marijuana, I take it, a drug, is that right?

Mr. Dye: Well, your Honor, I object to this.

The Court: I will sustain the objection.

Q. (By Mr. Lang) But was it not your testimony that you have not used any drugs during the period of time you have been in St. Louis?

Mr. Dye: Well, your Honor, may we approach the bench, please?

(Whereupon, discussion was had off the record at the bench, in the presence but out of the hearing of the jury.)

Q. (By Mr. Lang) About how many times would you say you had discussions with Chuck setting up either or both of these drug transactions? A. Repeat the question.

Q. How many times would you say that you had conversations with Chuck setting up these drug transactions? A. Anyone in specifics?

[59] Q. Let's start with the first transaction. How many conversations did you have with him with regard to that? A. I think two.

Q. Where did the first concersation take place? A. Both of them took place in The Pud Tavern.

Q. Was anyone else present at that time, at either of these discussions? A. No, there was not.

Q. With respect to the second drug transaction, how many conversations did you have? A. We didn't have any.

Q. You didn't have any conversations? A. No, not at the second.

Q. Were you regularly making reports to Agent Sawyer or Agent McDowell about the progress of your work and effort in contacting suspects? Did you make any reports, written, oral or otherwise? A. No.

Q. You never told Agent Sawyer—is that your testimony, that you never told Agent Sawyer at any time that Chuck was interested in selling him heroin? A. I don't understand the question.

Q. Did you ever tell Agent Sawyer that Chuck was interested in selling heroin to Agent Sawyer? **[60]** A. Did I ever tell——

Q. Yes, did you ever tell that to Agent Sawyer? A. No more than at the time that I set up the deal with him.

Q. Which time are you referring to? A. The first transaction.

Q. Let's go back to the first drug transaction. How much heroin did you tell Agent Sawyer that Chuck was going to sell? A. I asked Chuck what did he have to sell.

Q. Oh, you asked Chuck how much he had. What did he tell you? A. He said a half a spoon, which was a boil.

Q. Did Chuck tell you where he was obtaining this heroin from that he was selling? A. No, he did not.

Q. Did you ever ask him where he was getting it from? A. No, I didn't.

Q. You weren't interested in finding out? A. Well,——

Mr. Dye: Your Honor, I can't see what relevancy this has.

The Court: Well, it isn't a very proper question, but I will let him go—go ahead if you have an answer.

[61] A. Well, it's normally not a procedure for a guy to ask at that given time. You usually pick your time and places when to ask for certain information, and you try and do it in a way

where you don't arouse suspicion between yourself and that individual.

Q. So you were never with Chuck when he got any of the heroin that he allegedly sold, is that right? A. No, I was not.

Q. What was the arrangement made with Chuck with respect to your part in the transaction, that is to say, were you supposed to be getting some type of pecuniary gain out of helping Chuck find a buyer? Were you supposed to be getting some money from Chuck for helping—to act as a broker more or less in supplying him with Terry Sawyer as a buyer? A. No, it was really strictly coincident that when we first met and he asked me—was telling me about he needed some money, he knew some places he could get some heroin that he could sell, but he didn't know a lot of people here, so I stated I know somebody that would be interested in buying some.

Q. But you never had any part in attempting to get any money; you were just doing it gratuitously as a favor? A. Yes, it were.

Q. I take it then that you never gave Chuck any money at all to help him get together with these funds in purchasing **[62]** this heroin? A. No, I have not.

Q. You have not given Chuck any money for any purpose, is that right? A. No.

Mr. Lang: I have no further questions.

The Court: Mr. Dye?

Mr. Dye: Just a few, your Honor.

Redirect Examination

By Mr. Dye

Q. Mr. Hutton, to the best of your knowledge do you know the dates of the offenses that Mr. Hampton is charged with today? A. Yes, I do.

Q. What are those dates? A. February 25th and 26th.

Q. When did you arrive in St. Louis? A. Well, I had been in St. Louis approximately three or four days before the incident, so——

Q. Where did you first meet the defendant? A. I met him in The Pud Tavern on Delmar and Kingshighway.

Q. There was someone else at the tavern by the name of Gus, I believe you said? A. Yes, there were.

[63] Q. How long have you been—I believe a special employee, the term has been used, but I think you actually are called a confidential informant, is that correct? A. That's correct.

Q. How long have you been in that capacity? A. Oh, approximately ten, eleven years.

Q. What agency are you working with at this time? A. DEA.

Q. What is that? A. Drug Administration.

Q. Drug Enforcement Administration? A. Drug Enforcement Administration.

Q. I believe you stated you received compensation for your services, is that correct? A. Yes, sir.

Q. I believe you also stated it is irrelevant whether you make a purchase or do not make a purchase? A. That's correct.

Mr. Dye: No further questions, your Honor.

The Court: Mr. Lang?

Mr. Lang: I have one question.

Recross-Examination

By Mr. Lang

Q. But this is your job, is that right, to supply **[64]** information as to suspected drug sellers? A. Repeat that.

Q. Your job is to supply information to the government on suspected drug sellers, is that right? A. That's correct.

Q. And like anyone else, you're interested in seeing that you do a good job? A. That is correct.

Mr. Lang: Right. Thank you.

Redirect Examination

By Mr. Dye

Q. Does your interest in doing a job, does that encompass framing people? A. No, sir.

Mr. Dye: That's all.

The Court: You may step down.

(Witness excused.)

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[65] TERRY C. SAWYER,

being produced, sworn and examined in behalf of plaintiff, testified as follows:

Direct Examination

By Mr. Dye

Q. State your name, please. A. Terry C. Sawyer.

Q. What is your occupation, Mr. Sawyer? A. I'm a Special Agent with Drug Enforcement Administration.

Q. How long have you been so employed? A. Between three and a half and four years.

Q. Are you familiar with an individual by the name of Charles Hampton? **[66]** A. Yes, sir.

Q. Are you familiar with him under any other name? A. Yes.

Q. What is that name? A. Michael Byers, Michael Chenoworth——

Q. That's all we need.

Are you familiar with an individual by the name of Jule Hutton? A. Yes.

Q. Are you familiar with an individual by the name of James Gray? A. Yes.

Q. Is Jule Hutton and James Gray the same individual? A. That's correct.

Q. Were you so acquainted with these individuals on February the 25th, 1974? A. Yes, sir.

Q. Did you happen to receive a telephone call from any individuals on that day? A. Yes, sir, I did.

Q. Who was that individual? A. Jule Hutton.

Q. What was the substance of that conversation? A. He advised me that he had arranged for me to purchase **[67]** a quantity of heroin.

Q. Did he say who the individual was? A. Yes, he did.

Q. Who was that individual? A. Charles Hampton.

Q. What happened as a result of your telephone conversation?

Let me ask you, what did you tell him? A. At that time?

Q. Yes, at that time. A. He gave me a phone number where I could call him back, and I told him I would have to arrange to get some money.

Q. What did you do after you talked to Mr. Hutton? A. I talked with another agent about some money and got some government money and called Jule Hutton back.

Q. Who was that other government agent? A. James McDowell.

Q. Approximately what time did you call Mr. Hutton back? A. Must have been around 9:30 that time. I told him I would telephone him again when we got down in that area.

Q. What if anything did you do after making this telephone call to Mr. Hutton? A. Myself and Agent McDowell proceeded to the area of Lindell and Kingshighway, where I placed another telephone call **[68]** to Jule Hutton.

Q. Where was he at this time, if you know? A. He was at The Pud Tavern.

Q. What was the substance of your conversation? A. I told him that we would—Agent McDowell and myself would wait for him and the defendant at the corner of Kingshighway and Lindell.

Q. Was anyone else near the telephone at the time of these conversations? A. Oh, Agent McDowell may have been; I don't recall. We made the call from a small cafe down there.

Q. On any one of these telephone conversations did Mr. Hutton have occasion to talk to anyone while he was talking to you? A. Yes.

Q. Who was that individual? A. Well, he told me it was Defendant Hampton.

Q. What was the conversation that you had with him at that time? A. I asked Jule Hutton how much the boil of heroin was going to cost and he said, "Just a moment, the man's right

here, I'll ask him," and then he got back on the phone and told me that it would be $155.00.

Q. And at that time you made arrangements to meet Mr. **[69]** Hutton and the defendant? A. Well, that was the second call, and later that night about 10:45, when we actually got down into the area is when I made arrangements to meet with them.

Q. So after your third telephone call that you were a party to, what happened after that? A. Myself and Agent McDowell waited in the area of Kingshighway and Lindell for quite sometime. In fact, we drove up and down Kingshighway five times to see if we could see the people that we were supposed to meet, but we didn't, so we finally parked down there at Lindell and Kingshighway, and at approximately 11:15 we observed Jule Hutton and Charles Hampton arrive in that area.

Q. And what happened after they—did Mr. Hutton at any time come to your vehicle and talk to you? A. Yes, he subsequently came to the vehicle and—along with Jule Hutton. They both entered the government vehicle. Jule Hutton entered the rear seat with Agent McDowell, and Mr. Hampton got in the front seat with me.

Q. Before both the informant and the defendant arrived at your vehicle, did you have occasion to see Mr. Hutton after you yourself had arrived at that locale? A. Yes.

Q. What if anything was said at that time? **[70]** A. Well, we saw both—I saw both Jule Hutton and the defendant, and the defendant walked into the Chase Plaza Hotel, I believe.

Q. Chase-Park Plaza? A. Chase-Park Plaza, and I called Jule over to the car and he said he just went in, he would go get him; so he went into the hotel.

Q. So what happened after Mr. Hutton said the defendant arrived at your vehicle? A. Mr. Hampton explained to me that

the heroin was seven cut and—or it was seven, I guess you would say.

Q. What does he mean by "seven cut"? A. Well, I interpreted it to mean that it had been cut seven times; it had been diluted seven times. However, he may have meant that it was good enough to be diluted seven times. I thought that he was saying it's already been diluted seven times.

Q. Then what happened after he said that? A. I asked him for the heroin. He removed his hat and took it out of his hat band and handed to me a tinfoil packet.

Q. Directing your attention to Government's Exhibit 1-C, I would ask you to identify that, please? A. Yes, that is No. 1.

Q. Would you describe what that is, please? **[71]** A. This is the tinfoil packet that the defendant handed me on the night we are talking about.

Q. Now, there appear to be some sort of initials on that, is that correct? A. Yes.

Q. What are those initials? A. Those are my initials and Agent McDowell's initials. It's dated February 25, 1974, Exhibit 1, Case No. L-274X018.

Q. Is what is contained in Government's Exhibit 1-C the same items you received from Hampton on that date? A. Yes.

Q. And what happened then after Mr. Hampton obtained the Government's Exhibit 1-C from his hat? A. He handed it to me.

Q. What did you do with it after he gave it to you? A. I opened the package and examined the contents and held it up so that Agent McDowell, who was in the back seat, could remove a small quantity of substance and field tested it with positive results for heroin.

Mr. Lang: Your Honor, may I approach the bench? I object to the last testimony of the witness.

(Whereupon, the following proceedings were had at the bench, in the presence but out of the hearing of the jury:)

Mr. Lang: I'm asking that the portion of the witness' **[72]** testimony that the substance tested for heroin be stricken from the record and the jury be instructed to disregard it as hearsay testimony. This witness has not established his qualifications as an expert on the testing of heroin.

Mr. Dye: I'll join in that.

The Court: All right, do you want to start over again?

Mr. Dye: We can establish it with Agent McDowell; makes no difference.

The Court: Miss Poole, would you read me that question and answer.

(Whereupon, the reporter read the last question and answer.)

The Court: I'll sustain the objection and order the portion stricken, and I'll do this in front of the jury, following what Agent McDowell did with it, because I don't think it's responsive.

(Whereupon, the following proceedings were had in the presence and hearing of the jury:)

The Court: I will sustain the objection, so the jury understands, and ask that the portion of the answer explaining what Agent McDowell did after Agent Sawyer handed the packet to him, that that portion will be stricken and you are instructed to disregard it.

Now, proceed.

[73] Q. Did Agent McDowell make any comment after examining the substance? Just yes or no. Was there a comment or was there not? A. Yes, there was.

Q. As a result of that conversation what, if anything, did you do? A. I then talked with the defendant relative to the

price. I asked him if I could get a break on the price, and we negotiated and arrived at $145.00.

Q. What happened after you agreed to that price? A. I counted out $150.00 in official government funds and handed it to the defendant. He gave me $5.00 change.

Q. And what, if anything, else was said during your meeting with Mr. Hampton at that time? A. He advised me that he could obtain spoon quantities of heroin which would be better quality than that that I had just purchased. I asked him where I could reach him, you know, if he had a phone number I could reach him at, and he gave me a phone number. We then drove the defendant and the informant back to the corner of Kingshighway and—it's not Lindell——

Q. I believe—is it Delmar? A. Delmar.

Q. What happened after you arrived at that location? A. The defendant and Jule Hutton exited the government **[74]** vehicle and Agent McDowell and myself left the area.

Q. Now, after you left the area, where, if anywhere, did you go? A. As I recall, we went home.

Q. Did you maintain what has been marked as Government's Exhibit 1-C in your possession? A. Yes, sir, I identified it that night as Exhibit 1 of that case, initialed it and put it under temporary seal, kept it in my possession until the following day, when I removed it from the lock[illegible]al evidence envelope, weighed it, resealed it and mailed it to the DEA chemist in Chicago via registered mail.

Q. Showing you what has been marked as Government's Exhibit No. 1-A, I would ask you to identify that, please. A. This is the evidence envelope that I originally sent to the laboratory, sent the evidence in to the laboratory.

Q. How was that mailed? A. Registered mail.

Q. Now, directing your attention to the next day, February

the 26th, did you have occasion to talk to the defendant? A. Yes, I did.

Q. What, if anything, did you do as a result of that conversation? A. I met with him on the corner of Maryland and Kings- **[75]** highway that afternoon about 5:15, I believe.

Q. Was anyone with him when you met him? A. Yes, Jule Hutton was with him.

Q. Who was with you at that time? A. Agent McDowell.

Q. What, if anything, did they—you were parked? A. Yes, sir.

Q. In the vicinity, is that correct? A. That's correct.

Q. What, if anything, happened after they saw you? A. They came over and got into the government vehicle the same way they did the night before. Jule Hutton got in the rear seat with Agent McDowell and the defendant got into the front seat with me.

Q. What, if anything, transpired while you were in the vehicle? A. I asked the defendant if he had the heroin and he said he did, and removed his hat, took out a package of—tinfoil package again, handed it to me. I opened it and held it over the seat for Agent McDowell to withdraw a small quantity of substance.

Q. I show you what has been marked as Government's Exhibit No. 2-C and ask you to identify that, please. A. That is the heroin that I purchased from the defend- **[76]** ant on the 26th of February.

Q. What happened? What else happened after he had given you the heroin in the vehicle? A. I told him that I thought it was light weight, that it didn't weigh enough, and he explained that it was a full spoon. At that time I asked him how much it would cost. He said, $500. I told him that the money was

in the trunk, which I got out of the government vehicle, walked around to the trunk and opened it.

Q. Now, directing your attention to the inside of the automobile, did Mr. Hampton have any explanation as to your criticism of the weight? A. As I recall, he stated that it was a full spoon and was of high quality.

Q. So then what happened after you got out of the vehicle? A. I opened the trunk of the vehicle, whch was a pre-arranged signal to surveillance officers in the area that the arrest would occur, at which time I walked up to the passenger side of the vehicle where Mr. Hampton was seated and knocked on the window; he opened the door and I placed him under arrest.

Q. And what if anything did you do after you effected the arrest? A. We searched him for drugs and——

Q. We won't go into that. **[77]** A. ——weapons.

Q. After you arrested him did you have occasion to do anything with what has been marked Government's Exhibit 2-C? A. Yes, I placed that under temporary seal and placed it in the office vault overnight until the following day when I removed it, weighed it, resealed it and mailed it to the DEA chemist in Chicago via registered mail, return receipt requested.

Q. Directing your attention to Government's Exhibit 2-A, I would ask you to identify that, please. A. That is the envelope that I sealed it in originally and sent it to the lab.

Q. And I believe you stated that Government's Exhibit 1-C had some initials on it, is that correct? A. Yes.

Q. All right, now, I show you what has been marked Government's Exhibit 2-C and ask you if any such initials appear on that also? A. They are the same.

Q. Now, directing your attention to the 25th of February, did Mr. Hampton make any references to any future purchases of narcotics which he might be able to arrange? A. Well, I

believe I have already testified that he told me he would be able to obtain spoon quantities of heroin which would be of higher quality than the heroin I had just [78] purchased.

Q. What arrangements did you make to get in touch with him? A. I asked him for a telephone number.

Q. Did he in fact give you a telephone number? A. Yes, he did.

Q. Did you ask him who you should try to get in contact with? A. He said to ask for Chuck.

Q. And did he make any references to how quickly he could secure another amount of heroin? A. He told me it would be the following day.

Q. Did he say that he would have to check on it or anything to that effect? A. Said he would have to see—talk to his man about——

Mr. Dye: Okay.

Your Honor, at this time the Government moves to introduce Exhibits 1-A, 1-B, 1-C and 2-A, 2-B and 2-C into evidence.

The Court: Have you had a chance, first, to look over these?

Mr. Lang: I haven't as yet.

The Court: Would you.

Mr. Lang: No objections, your Honor.

[79] The Court: Exhibits 1-A, 1-B, 1-C, 2-A, 2-B and 2-C will be admitted into evidence.

(Plaintiff's Exhibits 1-A, 1-B, 1-C, 2-A, 2-B and 2-C were received in evidence.)

Mr. Dye: Your questions.

Cross-Examination

By Mr. Lang

Q. Officer Sawyer, when did you first meet the individual known as James Gray? A. Well, I probably met him in Kansas City a long time ago but I do not recall that. The first time I recall meeting him was approximately three weeks before the incident that we are discussing.

Q. What were the circumstances of that meeting? A. I picked him up at the bus station here in St. Louis.

Q. And at that time he was coming to work here as a confidential informant? A. That is correct.

Q. Now, you have been with the Drug Enforcement Administration for approximately three and a half to four years, is that right? A. That's correct.

Q. Often the Drug Enforcement Administration has to employ informers who are drug addicts to assist in apprehending [80] suspected sellers, isn't that right?

Mr. Dye: Your Honor, I think we have established that Mr. Hutton is no longer an addict, and I think that is——

The Court: I'll let him answer if it's the general policy, if he's familiar with it.

Do you understand the question?

Q. (By Mr. Lang) The question is often the DEA employs drug addicts to act as informant or on occasions, at least? A. Well, we try not to but it has been done.

Q. This may be done, these persons may be employed to apprehend sellers of heroin, is that right? A. They don't apprehend them.

Q. Well, to assist in apprehending them? A. That's correct.

Q. And sometimes is it necessary that the informant himself may make a purchase of drugs as opposed to an agent? A. It has been done.

Q. And, as a matter of policy of the DEA are there any special precautions taken in circumstances where the informer is going to make a purchase of drugs as opposed to——

Mr. Dye: Your Honor, I'll object to that.

The Court: I'll sustain that objection, unless you have evidence in this case that that was done.

Mr. Lang: Well, Your Honor, I will——

[81] (Whereupon, discussion was had off the record, at the bench, in the presence but out of the hearing of the jury.)

Q. (By Mr. Lang) Do you have any knowledge one way or the other as to whether or not James Gray was using drugs while he was here in St. Louis? A. No, sir, I do not.

Q. How many conversations, if any, did you have with James Gray regarding the first transaction that he was setting up with Chuck? A. I had three.

Q. When was the first one? A. It was about 8:30 at night on the 25th.

Q. What about the transaction that took place on the 26th, how many discussions did you have with James Gray regarding that, prior to the time? A. None.

Q. Was there an earlier sale of drugs that you are aware of by Chuck, or a substance by Chuck to another undercover agent named Frankie, who was going by the name of Frankie? A. Yes.

Q. When did that sale take place? A. I believe it was a week or so prior to this.

Q. Where did the sale take place? A. I don't recall the name of the place. I'm relatively **[82]** new in St. Louis——

Mr. Dye: May we approach the bench, your Honor.

The Court: Yes, I think you should. Miss Poole, would you come up?

(Whereupon, the following proceedings were had in the presence but out of the hearing of the jury:)

Mr. Dye: Your Honor, I object to this because it is beyond the scope of the examination and it is irrelevant.

The Court: This may be prejudicial to the defendant.

Mr. Lang: I understand. Our defense all along in this case has been the misrepresentations made by the informant to the defendant as to the nature of the substance he was selling, and I believe—as to the nature of the substances he was selling, this was an earlier sale which had been induced by the informant in this case, and there's evidence, I believe, to show that that substance did not test positively for heroin and so this later induced the defendant to believe that the other substances which were sold by him on these prior occasions were not heroin as well.

The Court: This involved this same Mr. Hutton?

Mr. Lang: Yes, it did.

The Court: With this defendant?

Mr. Lang: That's correct.

Mr. Dye: Your Honor, I will object. I think we **[83]** haven't laid a sufficient foundation in the first place for Mr. Sawyer's personal knowledge of this. He's not qualified to testify as to any chemical test. It's clearly beyond the scope of the direct examination and I think it's irrelevant.

The Court: Well, Sawyer said he was familiar with it. Now if he has no personal—Mr. Sawyer has indicated that he knew

of this thing, Mr. Long has not established that he had personal knowledge, and Mr. Lang had better follow through in that regard, but I will permit you, Mr. Lang, to go into this inquiry. I admonish you to be careful so nothing prejudicial to the defendant arises, and, secondly, to go slowly so that if there's anything that looks like you're getting into a dangerous area Mr. Dye can object and I can rule accordingly.

(Whereupon, the following proceedings were had in the presence and hearing of the jury:)

Q. (By Mr. Lang) Do you have any personal knowledge of an alleged sale made by the defendant to an officer, undercover agent named Frankie, or going by the name of Frankie, a sale of a controlled substance? A. No, sir.

Q. Do you have knowledge, direct knowledge, personal knowledge, of any sale of any substance by the defendant to an undercover agent going by the name of Frankie?

Mr. Dye: Your Honor, he just asked the question.

[84] The Court: He changed it.

Is Frankie the person that you want this officer to identify as the purported undercover agent?

Mr. Lang: Yes.

The Court: Did you understand that, Officer Sawyer? He didn't say narcotic, he said of any substance. Do you have personal knowledge?

The Witness: I don't have personal knowledge.

Q. (By Mr. Lang) You do know an undercover agent who goes by the name of Frankie? A. I know an undercover agent who has used the name Frankie in an undercover situation.

Q. Is this individual black or white? A. Black.

Q. Was this individual present in the police station or wherever the defendant was taken when he was arrested? A. Yes.

The Court: That is the first day we are talking about?

Mr. Lang: He was arrested after the second transaction.

The Court: After the second, on February 26th.

Q. (By Mr. Lang) He was present in the police station? A. It wasn't the police station; it was our office.

Q. What is this undercover—can you reveal the name of this undercover agent, real name?

[85] Mr. Dye: May we approach the bench, your Honor.

(Whereupon, discussion was had off the record at the bench, in the presence but out of the hearing of the jury.)

Q. (By Mr. Lang) The officer going by the name of Frankie, did you hear him make any statements in regard to the purchase of heroin at the police station that he had supposedly made from the defendant?

Mr. Dye: Your Honor, I will object to that on the grounds of hearsay.

The Court: I will sustain the objection.

Q. (By Mr. Lang) Did you hear the undercover agent who was going by the name of Frankie make a statement to the effect——

Mr. Dye: Same objection, your Honor.

The Court: Sustained.

Mr. Lang: May I approach the bench?

(Whereupon, discussion was had off the record at the bench, in the presence but out of the hearing of the jury.)

The Court: Go ahead. I'll let you answer, Officer, if you heard a statement made, you know, yes or no. By Frankie?

Q. (By Mr. Lang) By Frankie. A. Yes.

Q. May I inquire as to what statement?

Mr. Dye: Well, your Honor, that's hearsay.

The Court: I'll sustain it.

[86] Q. (By Mr. Lang) Do you have personal knowledge of where Chuck obtained the substances that he sold to you? A. No, I don't.

Q. Do you have personal knowledge that Chuck knew these substances were heroin? A. He purported them to be heroin.

Q. But you don't in fact know what was in his mind, is that right? A. No.

Mr. Lang: May I approach the bench, your Honor?

The Court: Yes.

(Whereupon, discussion was had off the record at the bench, in the presence but out of the hearing of the jury, and thereafter the following proceedings were had at the bench, in the presence but out of the hearing of the jury:)

The Court: We'll go on the record here. Mr. Lang, you have moved for—go ahead.

Mr. Lang: I move for the production by the prosecution of any written reports or written memorandum that were made by Officer Sawyer's investigation of this case or that he participated jointly in making.

Mr. Dye: May the record reflect the government has submitted the BND Form 6 to the defendant, which encompasses the agent's testimony and all his written notes.

[87] Mr. Lang: I would like to have a short opportunity at counsel table to review it.

(Whereupon, the following proceedings were had in the presence and hearing of the jury:)

Q. (By Mr. Lang) Your testimony is that you only had three conversations with James Gray on the 25th of February? A. That's the way—all I recall.

Q. And prior to that you had not at all discussed any drug transactions involving Chuck Hampton with James Gray? A. Not that I recall.

Mr. Lang: That's all I have, your Honor.

The Court: Thank you, Mr. Lang.

Mr. Dye?

Mr. Dye: May we approach the bench?

(Whereupon, the following proceedings were had at the bench, in the presence but out of the hearing of the jury:)

Mr. Dye: Your Honor, I'm ready to let this witness be excused. As you know, this is the individual who prepared the tape recordings, but I will be content to let the tapes go in on rebuttal unless defense has an objection to that.

Mr. Lang: I don't have any objection at this point.

Mr. Dye: So we will go through qualification of the witness as to the various elements of the admissibility of the tapes.

[88] Mr. Lang: We will stipulate to that.

The Court: He may be excused then?

Mr. Dye: That's correct, your Honor.

(Witness excused.)

The Court: Call your next witness.

Mr. Dye: James McDowell.

JAMES D. McDOWELL,
being produced, sworn and examined in behalf of plaintiff, testified as follows:

Direct Examination

By Mr. Dye

Q. Could you state your name, please? A. James D. McDowell.

Q. What is your occupation? A. I'm employed as a special agent for the Drug Enforcement Administration.

Q. How long have you been so employed? A. Almost five years.

Q. Have you had occasion to be involved in a case captioned United States versus Charles Hampton, also known as Michael Byers? A. Yes, sir, I have.

Q. Were you involved in this case on the date of Feb- **[89]** ruary 26, 1974? A. Yes, sir, I was.

Q. At approximately what time were you involved in this case? A. Shortly after 10:00 p.m. on that date.

Q. How exactly did you become involved? Did someone give you a phone call or what? A. Yes, sir, Special Agent Sawyer telephoned me at my residence.

Q. What if anything did you do as a result of that conversation? A. I met with Special Agent Sawyer and we then proceeded to the intersection of Lindell and Kingshighway here in the City of St. Louis.

Q. Lindell? A. Yes, Lindell.

Q. What happened? Approximately when did you arrive there? A. Oh, approximately 10:45 p.m.

Q. What happened after you arrived there? A. After we arrived, Special Agent Sawyer made telephone calls, as I recall, and later that same day we met with two other individuals.

Q. Was one of those individuals the defendant? **[90]** A. Yes, sir, it was.

Q. Would you identify him, please? A. He's the man seated at the table behind you, in the red or purple shirt.

Mr. Dye: May the record reflect identification, your Honor?

The Court: Yes.

Q. (By Mr. Dye) Now, was anyone with him, anyone else with him at that time? A. Yes, sir.

Q. Who was that? A. Special employee of the Drug Enforcement Administration.

Q. Who was that individual? A. Jule Hutton.

Q. Does he have any other name? A. Yes, sir; that he's known by?

Q. Yes. A. Yes, sir.

Q. What is that name? A. I believe it's James Gray.

Q. Approximately when did you meet Mr. Hutton on that day? A. Shortly after we arrived, within 15 minutes or so.

Q. Where did you meet? **[91]** A. Met at the—across—directly across from the Chase-Park Plaza Hotel on Kingshighway.

Q. What, if anything, did you do after you met with these individuals? A. Well, Mr. Hampton and Mr. Hutton entered our vehicle, government vehicle, and I seated myself in the back seat behind the driver. Mr. Hutton got in beside me in the rear seat and Mr. Hampton was seated in the passenger side of the front seat.

Q. Was there any conversation after entering the vehicle? A. Yes, sir, there was.

Q. Who made the conversation? A. The conversation was chiefly between Special Agent Sawyer and Mr. Hampton.

Q. What, if anything, was said at that time? A. Oh, Mr. Sawyer asked Mr. Hampton did he have the stuff with him and Mr. Hampton stated that he did.

Q. Then what happend after that conversation? A. Mr. Hampton withdrew an aluminum foil packet from the hat that he was wearing at the time and handed it to Special Agent Sawyer in the front seat.

Q. What happened after Agent Sawyer got hold of that packet? A. Agent Sawyer examined the packet and I took a sample of the packet and tested it, made a field test on it.

[92] Mr. Lang: May we approach the bench?

Mr. Dye: Well, you know, he can state what he did, your Honor, if he performed a field test. He's not making a conclusion.

Showing you what has been marked as Government's Exhibit 1-C, I would ask you to identify that, please. A. This is the packet which I made a field test on on the night of the 25th of February, '74.

Q. How do you know that is the same packet? A. My initials are on the label in closing the packet.

Q. As a result of your field test which you performed, what, if anything, did you say? A. I indicated to Special Agent Sawyer that the substance appeared to be of satisfactory quality. I might say that the field test was for heroin, and I indicated to Special Agent——

Mr. Lang: I didn't hear the answer.

The Court: Let Miss Poole read it so we will have it.

(Whereupon, the reporter read the answer.)

Mr. Lang: May I approach the bench?

(Whereupon, discussion off the record was had at the bench, in the presence but out of the hearing of the jury.)

Q. (By Mr. Dye) I believe you made reference to a field **[93]** test that you performed? A. Yes, sir.

The Court: Excuse me. I will sustain the objection of the defendant to the last question and answer, and the portion giving any result of the field test will be stricken from the record and the jury instructed to disregard it.

Q. (By Mr. Dye) Now, I believe you stated you performed a field test, is that correct? A. Yes, sir, that is correct.

Q. Have you performed these field tests in the past? A. Yes, sir.

Q. Approximately how many times did you perform them? A. Just giving a rough estimate, I would say approximately 50 or 60.

Q. Fifty or 60. Have you had any special training in that area in how to perform field tests? A. Yes, sir.

Q. Did you receive training from the Bureau of Narcotics and Dangerous Drugs to that effect? A. Yes, sir, that's correct.

Q. You did have occasion to examine this heroin or what has been marked Government's Exhibit 1-C, is that correct? A. Yes, sir.

Q. Could you briefly describe the test you performed on **[94]** it? A. I took a portion of the substance which was contained in the aluminum foil and immersed it in a glass vial containing a chemical reagent.

Q. What, if anything, developed in the vial? A. The liquid in the vial changed color.

Q. To what color did it change? A. To a reddish purple.

Q. Based upon your examination of that substance and also your training as a special agent by the Drug Enforcement——

Mr. Lang: I think the question is calling for hearsay.

The Court: Well, first, complete the question and let me see if it's going to call for hearsay.

Q. (By Mr. Dye) Based upon your examination of Government's Exhibit No. 1-C, and based upon your training as a narcotics officer by the Drug Enforcement Administration, have you arrived at a conclusion as to the substance which can be found in Government's Exhibit 1-C?

The Court: Excuse me, don't answer yet, Agent.

(Whereupon, discussion was had off the record, at the bench, in the presence but out of the hearing of the jury.)

The Court: I will sustain the objection as to that question until you have a more complete foundation.

[95] Q. (By Mr. Dye) Now, you completed the field test, is that correct? A. That's correct.

Q. What was the color of the field test? A. Reddish purple.

Q. Based upon your experience and examination of the substance, what does a reddish purple color indicate?

The Court: Go ahead, make your objection.

Mr. Lang: I object to the form of the question as calling for hearsay.

Mr. Dye: I can't see how it's hearsay.

Mr. Lang: Could we approach the bench?

(Whereupon, the following proceedings were had at the bench, in the presence but out of the hearing of the jury:)

Mr. Lang: It's hearsay, the question whether the substance was in fact heroin. If he's going to express an opinion about it being heroin, he has to show qualifications as an expert. No qualifications have been put into evidence about this witness' knowledge of what—he's not an expert on the question of what these tests demonstrate. All he knows he gives a test and it produces certain results. No proper foundation has been laid, No. 1. No. 2, it would be hearsay; if he does give an opinion as to what the substance is, it would be hearsay, if he says it is heroin.

[96] The Court: He's already shown that he has experience in using this machine, and in training of the use—I say machine, of this particular test.

What do you assume or understand his answer will be, Mr. Dye?

Mr. Dye: That it indicates it to be a derivative.

The Court: I'll overrule the objection at this time.

(Whereupon, the following proceedings were had in the presence and hearing of the jury:)

Q. (By Mr. Dye) Based upon your examination of 1-C and your formal training, have you arrived at a conclusion as to the substance in Government's Exhibit 1-C pursuant to the field test? A. Well, generally the field test is used only as a preliminary indicator. My definite conclusion is usually not drawn from the field test, so I, at that point, I couldn't say that it was definitely one thing or another, only giving the general indication as the field test is designed to do.

Q. What was that general indication? A. That the substance contained heroin.

Q. What did you say after conducting this test? A. I told Agent Sawyer that the substance appeared to be of satisfactory quality.

Q. And what, if anything, did Agent Sawyer do after that? **[97]** A. Agent Sawyer then discussed with Mr. Hampton any further transactions, the price of the—of any further transactions. He also discussed the price of the current—that is, this packet, the price of this packet, discussed the quality of this packet with Mr. Hampton.

Q. Did Mr. Hampton make any representations as to the quality of the heroin? A. Yes, sir, he did.

Q. What did he say? A. Stated that the heroin contained in this packet was a seven, but that it would take a nine, which indicates based on my experience that it was cut seven times but would stand a cut to nine times.

Q. Did he make any representations—did you inquire as to what if anything was the substance of the Government's Exhibit No. 1-C at that time? A. I'm not sure I follow your question, sir.

Q. Did you discuss with him the contents of Government's Exhibit 1-C? A. As far as its quality or its actual——

Q. As far as its quality, that's correct. A. Yes, sir.

Q. What if anything did you say? A. Other than the fact that it was cut seven times and **[98]** would stand a cut to nine times, is that——

Q. Well, was there any representations made as to what elements, what chemicals were in Government's Exhibit No. 1-C? A. Specifically?

Q. Yes, specifically. A. Not that I recall.

Q. Now, as a result of your examination of Government's Exhibit 1-C, what, if anything else happened at that time? A. Special Agent Sawyer paid Mr. Hampton for the exhibit.

Q. What happened then? A. Special Agent Sawyer asked Mr. Hampton if he could obtain additional quantities of it, specifically mentioning a spoon quantity of the substance. Mr.

Hampton indicated to Special Agent Sawyer that he would be able to obtain spoon quantities but was unable to discuss a price for the spoon quantities at that time, stating that he would have to contact his source to obtain a definite price for the additional quantity.

Q. Then after the conversation in the vehicle terminated, what if anything happened? A. Special Agent Sawyer was to contact him. Special Agent Sawyer asked Mr. Hampton who he should ask for when he called. Mr. Hampton stated that he should ask for Chuck.

Q. Now, directing your attention to the next day, which would be February the 26th, 1974, did you have occasion to work **[99]** on this case? A. Yes, I did.

Q. When did you become involved in this case on that day? A. About 4:00 p.m. Special Agent Sawyer informed me that we would again be meeting with Mr. Hampton in approximately an hour at the intersection of Kingshighway and Maryland Avenue, I believe, in St. Louis.

Q. What did you do as a result of that conversation? A. We went to that location, that is, Maryland Avenue and Kingshighway, and met with Mr. Hampton and Mr. Hutton again.

Q. What happened after you met with them? A. Mr.—I got out of the vehicle, got in the back seat, assuming the same position in the vehicle that I had the previous night. Mr. Hutton also got in the back seat with me. Mr. Hampton again got in the front passenger side.

Q. After they entered the vehicle, did you have any discussions? A. Yes, sir.

Q. What was the gist of the discussions in your best recollection? A. Special Agent Sawyer again asked Mr. Hampton if he had brought the substance with him. Mr. Hampton again removed his hat, although it was a different hat than the day

before, and handed Special Agent Sawyer a similar package to that which **[100]** he had received the previous night.

There was discussion as far as its quality, and the price involved.

Q. Did you have occasion to examine what has been marked as Government's Exhibit 2-C at that time? A. Yes, sir.

Q. Did you conduct a test on that substance? A. Yes, sir, I did.

Q. Was that the same test you discussed previously in your testimony? A. That's correct.

Q. And based on the examination of the substance in your experience as a Special Agent of the Drug Enforcement Administration, did you arrive at a conclusion, a tentative conclusion as to the substance contained in Government's Exhibit 2-C? A. Yes, sir, I did.

Q. What was that conclusion? A. The tentative conclusion which I reached was that the substance contained some quantity of heroin.

Q. Did you make any inquiry of Mr. Hampton as to what if any chemicals were in Government's Exhibit No. 2-C? A. Yes, sir, I did.

Q. What did you ask? A. I asked Mr. Hampton what the heroin had been cut with **[101]** and he stated that he had added lactose and Dormin.

Q. Did he make any reference to any other chemical? A. Not that I recall.

Q. Was there anything unusual about the heroin when you opened the package? A. Not that I recall.

Q. Was there any reference made to quinine in the course of your discussions? A. There may have been but I don't recall specifically at this time.

Q. After you conducted your test, what did you then do? A. I indicated to Agent Sawyer that again the substance appeared to be of satisfactory quality, meaning to him that the field test had been positive.

Q. We have heard a lot of discussion about what "spoon" means, could you describe what the term "spoon" signifies? A. Well, it can signify several things. It can either be a teaspoon or tablespoon full of heroin, or any other substance for that matter.

Q. Do you know what a "boil" is? A. That is a new term to my street vocabulary. It indicates, as far as I can tell, a quantity of substance somewhat less than a spoon.

Q. After you conducted your test and after you had given **[102]** the substance back to—I believe you stated it was Agent Sawyer, is that correct? A. That's correct, I never actually took the substance from him. I only removed a portion of the substance from the package itself.

Q. And after you conducted your test what if anything happened after you conveyed the information result of the test, what happened to Sawyer then? A. Special Agent Sawyer discussed price with Mr. Hampton and he indicated, as I recall, the purchase price was $500. Special Agent Sawyer then stated, well, he would have to get the money, and it was in the trunk, whereupon, he exited the vehicle and went to the trunk, which he had opened from the inside as it had an inside hood release—I mean, excuse me, trunk release, and the raising of the trunk was an indication to the surveillance agents that the heroin had been delivered and that Mr. Hampton was to be arrested at that time; whereupon, he was.

Q. What if anything happened after his arrest? A. He was transported to the St. Louis District Office where he was processed.

Q. Finally, directing your attention again to Government's Exhibit 1-C and 2-C, would you identify those, please? A. 1-C is the package which I tested on the 25th of Feb- **[703]** ruary of '74.

2-C is the package which I tested the following day, the 26th of February, 1974.

Mr. Dye: No further questions, your Honor.

The Court: Mr. Lang, you may inquire.

Cross-Examination

By Mr. Lang

Q. Officer McDowell, what was the name of the field test that you gave on February 26th? A. I believe the name of it is the marquis reagent test.

Q. Marquis reagent test? A. Yes, sir.

Q. Would you explain what happens when you give this test? What takes place? A. Well, the liquid contained within the —it's a small glass vial——

Q. What is this vial usually made out of? A. Glass.

Q. Any specific type of glass, like porcelain? A. Not that I know of, sir.

Q. Go ahead. A. The substance to be tested is placed into the vial and immersed in liquid, in the liquid which is contained in the glass enclosure, and based upon any color changes which the **[104]** liquid changes to, tentative results or tentative conclusions are sometimes made from the color change.

Q. So, when you dropped the substance in the glass vial you observed the initial color form, is that correct? A. That's correct.

Q. And then you watched this color change to some other color, is that correct? A. I don't recall. It may have become darker after a period of time, but I don't recall any——

Q. What color does one observe in this case? A. What are the options?

Q. If we're checking for heroin, what color would we be looking for? A. Be looking for a purple, reddish purple color.

Q. Reddish purple. Are there any other compounds which would give the same purple violet color? A. Yes, sir, I believe there are.

Q. Are there approximately about 45 other compounds that will give out that same color, including a laxative that you can purchase from your drugstore? A. I'm not sure about the number, no; I'm not sure about the laxative which I have never tested.

Q. You're not a chemist, are you? A. No, I'm not.

[105] Q. Is the marquis test specifically for heroin? A. No, sir.

Q. It's not specific; simply tests alkaloids in general, isn't that true? A. As you stated, I'm not a chemist, so I'm not exactly sure.

Q. So you don't even know what the test is? A. I don't know exactly everything that the test is, no, sir.

Q. But there have been other substances that would have given the same reaction? A. That's correct, yes, sir.

Q. So, it was just a speculative conclusion on your part that the substance was in fact heroin? A. That's correct.

Q. Isn't it a fact there are other opium derivatives besides heroin that would have given that same color as well? A. I'm not sure they give the specific same color. It is a test for all opium derivatives; that's correct.

Q. Now, you don't know in fact where Chuck got the heroin from, or the alleged heroin? A. That's correct, sir.

Q. Therefore, you don't know if the person who supplied it to him made any statements regarding its chemical composition, **[106]** do you, other than it was heroin? A. Your question is do I know what the person he obtained it from said to him?

Q. Right. A. No, that's correct.

Mr. Lang: I don't have any other questions, your Honor. I would like to approach the bench.

(Whereupon, the following proceedings were had at the bench, in the presence but out of the hearing of the jury:)

The Court: Mr. Lang has raised a question concerning the qualifications of this witness and concerning, let's say, what Mr. Lang feels were prejudicial statement or inferences regarding this substance testing out to be heroin. I think that the witness was quite clear in explaining that these were tentative field tests and, accordingly, I am most willing to again mention, summarize that fact to the jury, and that there were a number of other substances which likewise could be checked out to be this color. Is that suitable Mr. Lang?

Mr. Lang: Yes.

The Court: Mr. Dye?

Mr. Dye: That's fine, your Honor.
I don't have any other questions.

(Whereupon, the following proceedings were had in the presence and hearing of the jury:)

The Court: Ladies and gentlemen, at the conclusion of Agent McDowell's testimony I would just, with respect to the portion concerning the tests that Agent McDowell has explained he performed, I would mention to the jury, remind the jury, that the agent stated that they were field tests and quite tentative in nature, that any number of substances apparently could likewise result in this same purple reddish color, and that Agent McDowell explained that he was not a chemist, and, accordingly,

as far as his testimony is concerned, the jury should take all those factors into consideration. It was certainly not—Agent McDowell would be the first to state, I believe, he could not tell heroin from other substances.

Is there anything further?

Mr. Dye: Just one thing, your Honor.

(Whereupon, the following proceedings were had at the bench, in the presence but out of the hearing of the jury:)

Mr. Dye: Your Honor, in my direct examination of Agent Sawyer, I neglected to ask him if he could identify the defendant. I would like to recall him at this time unless the defendant would like to stipulate.

Mr. Lang: We will stipulate that he can identify the defendant. It's not an issue.

Mr. Dye: Could we inform the jury of that matter?

The Court: Yes, I will do it gracefully if I can.

[108] (Whereupon, the following proceedings were had in the presence and hearing of the jury:)

The Court: You may step down, Agent McDowell.

(Witness excused.)

* * * * * * *

[110] DEFENDANT'S CASE

CHARLES HAMPTON,

being produced, sworn and examined in his own behalf, testified as follows:

Direct Examination

By Mr. Lang

Q. What is your full name? A. Charles Hampton.

Q. But you prefer being called Chuck, is that right? A. Yes.

Q. Chuck, have you ever been known by any other name? A. I have used an alias since being here in St. Louis.

Q. What was that name? A. It was Michael Chenoworth.

Q. Any other name? A. No.

Q. How old are you, Chuck? A. Twenty-seven.

Q. You have a son named Val, V-a-l, who is four years old by Mary Carter, is that right? A. Yes.

Q. How much education do you have, Chuck? A. Presently I'm credited with about two years of college, correspondence and actual school.

Q. Did you go straight through high school, so forth? A. No, I'm a ninth grade dropout.

[111] Q. You dropped out of the ninth grade. Where was that? A. In Chicago, Illinois.

Q. After you left high school, Chuck, did you go into the service? A. No, I didn't directly. I kind of floated around between public schools in Chicago for about a year, dropping out, missing courses, not passing, really.

Q. But you have been in the military, right? A. Yes, I did.

Q. When did you go into military service? A. I enlisted April 22, 1964.

Q. What branch was that? A. United States Marines.

Q. You say you enlisted. You weren't drafted? A. Yes, I did enlist.

Q. What rank did you achieve? A. I went up to E-4.

Q. Where were you stationed? A. I was stationed in California for a year, Vietnam for 12 and a half months and North Carolina for the last year.

Q. Did you see any combat in Vietnam? A. Full 12 and a half months.

Q. Did you receive any citations in Vietnam?

Mr. Dye: I object to that, your Honor.

[112] The Court: I'll sustain the objection.

Q. (By Mr. Lang) Were you honorably discharged? A. Yes, I was.

Q. Were you in the Marines three years all told, is that right? A. Three years and some days; almost three years and a month.

Q. While you were in Vietnam, Chuck, did you become addicted to any drugs? A. I didn't become fully addicted, but I got the habit over there.

Q. What drug was that? A. I was starting off with opium, it was easy to get over there; it was opium as far as I knew, opium. I can't be technical on it.

Q. After you got out of the service were you still using drugs? A. Yes, I was. I went to heroin.

Q. What period of time? When would that have been? A. I was discharged May 10, 1967, from North Carolina and I had the habit then, and the addiction was becoming pretty

strong and I carried it back to Chicago with me. I went straight home.

Q. How old were you when you returned to civilian life? **[113]** A. May 10th when I got out, I was 23, I mean, excuse me, 20, I'm sorry.

Q. Where were you living after you got out of the Marines? A. In Chicago.

Q. What was the condition of your drug habit about that time? A. When I first went home it wasn't that bad, but it became worse as time went on, and about three months after being discharged, May 10th, September, about September, I was fully addicted.

Q. Did you move away from Chicago? A. Not at that time.

Q. Were you working after you got out of the Marines? A. I was working for a while but the drug addiction hampered me going to work on time or even being accurate and efficient on the job, so I got fired out of two steel mills and the third job I quit.

Q. And you say your addiction was becoming worse at this time? A. Yes, it was.

Q. So you needed money to support your habit, is that right? A. Yes, I did.

Q. Was this when you got involved in the armed robbery? **[114]** A. Not directly.

Q. When did the armed robbery take place? A. This armed robbery took place in North Carolina.

Q. How did you get down to North Carolina? A. By car with a friend.

Q. Just on a short trip, visit or what? A. Well, it was a trip to see some other people and on the way we were just planning on doing anything we could to get some money.

Q. Were you convicted of this armed robbery? A. Yes, I was.

Q. How old were you at that time? A. When I was convicted I was 23.

Q. How long a sentence did you receive? A. Twenty-eight to 30-year sentence.

Q. Twenty-eight to thirty years? A. Yes, it was more than that but it was reduced some later.

Q. How much of that sentence have you served? A. Full time, approximately four years.

Q. Now, you said that you had a ninth grade education when you went into the Marines, is that right? A. Yes, ninth grade dropout. I had further education but it was all self taught.

[115] Q. When did you get your college credit? A. College credit came to me in prison, I acquired that.

Q. Was that through a correspondence course? A. Yes, I had six major courses through correspondence and the rest came in regular school, going to street school.

Q. So you were involved in a program where you were not always in prison, is that right? A. Yes, just before I left I was.

Q. Why did you leave? A. Well, I was being harassed by a particular officer at the unit, and for some reason or another he didn't want to hold true to these new programs of rehabilitation where inmates would leave the unit for certain periods during the day, he didn't believe—I won't say he didn't believe, he showed me he was kind of against it, at least in my behalf.

Q. You were heavily involved in prison reform, is that right? A. Yes, I was president of the grievance committee and two or three other unit activities. I was vice president of the Jaycees.

Q. Did you reach a point where you felt this prison official was going to terminate your involvement in this program outside of the prison? A. Yes, I did by his direct comment to me. He let me know that one slip—a statement to the——

[116] Mr. Dye: I'll object.

The Court: I'll sustain the objection. I think he's gone into it enough. I'll order that stricken, and the jury instructed to disregard it. It's hearsay, and I don't think it's proper in this case.

Q. (By Mr. Lang) So, you walked away from that program, is that right? A. Yes, I did.

Q. Where did you go? A. Where did I go after I walked away?

Q. Yes. A. I went through North Carolina and Virginia. I stopped at Norfolk, Virginia. I wired—I called home first and had some money wired to me and I caught a bus all the way to Washington, D. C., and at Washington, D. C., I went to Baltimore and I was running out of money again, I called home and had some more money wired to me, and from Baltimore I went to New Jersey, Atlantic City, New Jersey,—Ocean City, first, and then Atlantic City.

Q. When did you meet Mary in Chicago? A. In approximately late 1967.

Q. I'm not talking about when you first met her. When you met her en route to St. Louis, or you didn't? A. After I escaped I finally made it back to Chicago **[117]** from New Jersey, money was running out and nobody could wire anything, so I stayed in New Jersey, I met some people, they let me stay with them,

not knowing what I was doing or anything, they just knew I was in bad shape, and they took me in and I stayed with them for approximately six or seven days, until money was gotten together. I was steadily calling home, and when I got back to Chicago I looked up Mary.

Q. Did you all come to St. Louis together? A. Yes, we did.

Q. Now, when you got to St. Louis where were you living? A. We first stayed at the Carousel Motel for about a week.

Q. Where is that located? A. On Kingshighway. I'm not sure of the street that it's near, but it's on Kingshighway.

Q. Then did you move somewhere else? A. We moved to the Kingsway Apartment Building on Kingshighway; 902, I think, is the address.

Q. Your son was here with you in St. Louis, is that right? A. Yes.

Q. How were you supporting yourself at this time? A. Well, I have been gambling all of my life, and hustling, I shoot dice, I shoot pool, pretty fair, I guess, and I play cards pretty good.

Q. Did you reach a point—Mary brought some money with **[118]** her as well? A. Mary had approximately $600 when we left Chicago.

Q. That money, I take it, was starting to run out? A. Yes, it was.

Q. Now, you have heard testimony about James Gray, that you solicited him to get involved in a drug transaction, did you solicit him or did he come to you? Just what happened? A. James Gray came to me after we had become pretty closely acquainted through this pool shooting thing. He was, as far as I was concerned, a hustler like myself. He shot pool pretty good. As a matter of fact, him and I were the best in the area as far as known by anybody, or said anyway, and we became pretty tight behind this mutual thing of being able to shoot pool

good. So I became closer to him than I had to guys like Gus, Kenny, Mike and other people that were around the area, that were around The Pud, usually, and I told him that I was uptight, that money was running out and I was in a situation where I couldn't just go and get a regular job. I didn't tell him why, because I was on escape or anything, I just left it open that I was uptight, and I couldn't get a job that easy, I was looking around but I couldn't go and apply for something like a post office job where I might be checked. So, I don't know what he took from that, but that wasn't the important thing, the thing was I did explain to him I was uptight and I told him **[119]** if he knew anything about a way to get some money there —or here in St. Louis that would be kind of clean that I would go for it, and I needed some help.

Q. Did he bring an idea to you? A. Not at that time. He said he had something in store; he said he would think about it, and that's all.

Q. When did you next discuss any type of drug?

When did you first discuss with him a drug transaction? A. I didn't even bring the drug transaction to him; it was brought to me. As far as the discussion, he just——

Mr. Dye: Your Honor, I don't think that is responsive.

The Court: Sustained.

Q. (By Mr. Lang) Did he initiate the discussion about the drug transaction? A. Yes, he did.

Q. When did that conversation take place? A. About three days after this first mention to him of being uptight. When I first mentioned to him I was uptight, about three days later.

Q. Where did that conversation take place? A. In The Pud.

Q. Was there anyone else there present who heard the conversation that you know? A. Guy named Kinney and another guy named L. C.

[120] Q. What did James say to you during the course of that conversation? A. He didn't speak directly to me. He was speaking to all three of us.

Q. What did he say to the group? A. That he had something that he was working on where we could make some money and I inquired—I asked the question, I was curious as to what it was, and he said he just had a little deal working where we wouldn't have to come up with anything, any money anyway, and we could make some money.

Q. He didn't go into more detail about it? A. Not with L. C. there, he didn't like L. C. too much because he said he was loose-mouthed or something anyway, but he discussed it more with Kenney and I.

Q. When did he first go into detail about the transaction? A. That same night; later that night.

Q. Where was this conversation taking place? A. In The Pud.

Q. Who was there at that time? A. Gus was there, but he kind of cut Gus out and told me that he would prefer for me to be the main man, because he felt that I could handle it better, I had more finesse, as he called it.

Q. What was the substance of his conversation with you? **[121]** A. That he had a friend that was either a pharmacist or worked in a pharmacy, and that he could get something that would give the same reaction as dope, which in our conversation, our jargon, dope meant heroin, that's all we discussed it as, but he said this will give the same reaction, and he had some guys that he knew that he had known from Colorado, that's the place he mentioned, and he said that, well, they were here now and they were in the dope business and they were looking for a buy, and that they had been burnt before, so they should be easy pickings for something like this here, and all we were waiting for was for this pharmacist friend of his to come up with whatever he had.

Q. Did he mention the name of the substance? A. He didn't mention the name of it. He said it was just a compound of stuff. I'm not that familiar with the new drugs they are using on the street.

Q. Did he mention the pollutant? A. The pollutant was mentioned later.

Mr. Dye: Your Honor, I'll object.

The Court: I'll sustain the objection.

Q. (By Mr. Lang) You don't know the name of the drugs he was referring to? A. Not for the original mixture.

Q. Just an unspecified concoction? **[122]** A. Yes, all except for one name.

Q. What was that name? A. He mentioned later that he would use something that they were shooting on the street, just like heroin, called pollutant, but he brought it up later and said it was an additive that would strengthen this compound to really make it seem like dope.

Q. You say this was called pollutant? A. Pollutant is all I know.

Q. Do you know how to spell it? A. No, I haven't been able to find it. I have been looking for it.

Q. You say you've been looking for it? A. Looking for it, trying to find out the term.

Q. When was the next conversation that you recall having with James and Gus setting up this transaction? A. Again that night. This is the same day of when the conversation was first introduced.

Q. Would you relate what went on in that conversation? A. He told me he had—had been getting phone calls but he told me one of the calls the guy said he couldn't handle it that night, he couldn't get down to him. This was some guy named Archie

that was supposed to be at a pharmacy or something, and he said the guy would take care of it tomorrow, **[123]** which was the next day, and after he took care of that, he said he would—soon as we got this package in our hands, he said he would contact these buyers, and we'd set it up.

Q. Did James introduce you to a person who was going to be a buyer? A. Yes, but this was only at the sale when I made this first sale to him.

Q. Was this person black or white? A. This person was black.

Q. What was his name? A. This was a guy named Frankie.

Q. His name was Frankie? A. All we knew him by was Frankie. All I knew him by was Frankie.

Q. When did you last see Frankie? A. At the Federal Drug Administration's office when they were questioning me.

Q. That was the day on which you were arrested? A. February 26th, right, that night.

Q. Who was questioning you? A. Federal Agent Sawyer and the other one, McDowell, James, all I knew him by was Jim, but the two who appeared here as a witness, anyway, they were questioning me, and in walks this guy Frankie, and I'm thinking that he's busted at first, **[124]** and he starts to smiling and he asked me a question of "Where's my money at, that bad stuff you gave me?"

Q. This was the first person whom James introduced you to to make a sale to, right? A. Right, at the Gregory Lounge.

Q. Where is the Gregory Lounge located? A. Somewhere near Olive. There's a place called Musical Sales on 3007 Olive, which I went there to get a job, and this Gregory Lounge is in an apartment like complex about two blocks from there, not too much more. I don't know the streets in St. Louis that well.

Q. So you made a sale of, we'll call it turkey, this fake or counterfeit drugs to Frankie, is that right? A. Yes, this definitely was. I saw snuff put in this.

Q. Who supplied you with those? A. James came over with the original package.

Q. Did you see him mix it up? A. No, he had it mixed already. This is what he came from his pharmacist friend with the next day, but I saw him put some snuff in it that he said he was adding for color to make it look like brown dope that they are getting today

Q. After this sale, when you made this sale you believed that you were selling some counterfeit drugs to Frankie? A. Some knd of drugs that would give the effect of dope; **[125]** that's all I know.

Q. Did you later learn that Frankie was looking for you because he thought you had made a bad sale? A. Right, this is the message I got from Gus through James. He said James told him that Frankie had called——

Mr. Dye: Your Honor, I will object. This is multiple hearsay.

The Court: Sustained.

Mr. Lang: I will withdraw the question, your Honor.

Following this initial termination that you were involved in with Frankie, did you have any more conversations with James concerning other buys, setting up transactions with another buyer? A. Yes, but I—I don't remember how long it was. It probably came immediately after that—the split up of the money, which was later that night. It didn't come right into focus right away.

Q. "Split up of the money," what are you referring to? A. Well, James and I split up some money and we gave Gus some for riding with me, he was supposed to be my riding

partner, like I was a big dope dealer and I had to have somebody with me.

Q. So when was the next conversation? When did the next conversation take place that you had with James about another **[126]** narcotic transaction? A. Well, I started to mention it earlier, but it was later that night, I did bring it to James then, told him, I said, "I like what that was." I didn't know at the time this Frankie guy might be out after me, something, I didn't know that until the next day, but, anyway, I mentioned it to him and told him it was pretty nice, told him if he could do something like that again I would be straight, by then I could get a job, something to tide me over, hold me over, because the money we split on this first deal was kind of small, for what I needed for the family anyway.

Q. How much was that? A. I think we split up around $200, and I gave Gus—well, we together gave Gus about 30, we split 170; James took $35.00 out of 170 for this Archie, the pharmacist guy that was supposed to supply us with this fake garbage, and whatever he supplied, well, it had been arranged to give him some money back, plus a little profit.

Q. So when you told James that, you knew, you were satisfied the way the first deal had went—— A. Right.

Q. ——what did he say? A. Well, he just—he didn't mention anything about a deal at the time, I really was trying to solicit it out **[127]** of him, you know, did he have any other friends that were this foolish.

Q. When did he next talk to you about setting up another sale? A. Well, the next day, we got into a small conversation about it, and he mentioned that he might have somebody else, but we would wait and see because he said that this pharmacy guy would—he wanted, you know, a better deal

next time, he said he didn't get enough money; figured we had made some money.

Q. Following that conversation when did you next discuss setting up a transaction? A. I guess it was about two or three days then.

Q. Who was present at that time? A. He didn't have anybody present but me because I went to his room.

Q. This took place in James' room? A. Right.

Q. Westgate Hotel? A. Well, it started in the lounge downstairs, and his girl friend, Mary, was there, and he didn't want to discuss it in the lounge because we couldn't get any privacy, so he said, "Let's go up to the room."

Q. What was the substance of the conversation you had in the room? **[128]** A. Well, he brought up the fact he had a good buyer here, this was some other people he had known in the past, he didn't say where they were from or what, but he said they were ready to buy and that they were white. So I asked him, "Well, what is going to be the whole thing on this deal? Are we going to be able to get enough of this same thing we just sold to this Frankie dude?" By then I knew, or I had heard rumor that this Frankie was kind of looking for me, so I told him that I really wasn't too much worried to split by the fact he mentioned these white guys, instead of going to more blacks, I felt it was more safe, because I didn't think whites would be coming in the neighborhood looking for me that easy.

Q. Did James tell you what this substance was going to be? A. He never mentioned what this basic substance was. I knew pollutant was added, and I saw snuff put in before; but the pollutant was supposed to be the strong additive.

Q. So you believed the substance that you were going to next sell to those white buyers was the same one that you had

sold to the black buyer, Frankie, earlier, is that right? A. Direct same thing, right.

Mr. Dye: Your Honor, I'll object. This is argument, it's calling for a conclusion on the part of the witness.

The Court: Sustained.

Q. (By Mr. Lang) When did you all make arrangements to **[129]** set up the sale that took place on February 26th? A. At least three days before, February 22nd or 21st.

Q. Where did you all make these arrangements? A. Again, we made them in his hotel room because we had to discuss where we were—or how we were going to get the money together to pay this guy Archie. James claimed Archie wanted his money ahead of time this time for this fake mixture. Not fake, I don't know really what it was, but whatever this mixture was, he wanted his money ahead of time.

Q. You were supposed to provide some money, then? A. I was supposed to provide half of it because by me being one of the principals in the first transaction, I split out half, so now, I'm a half partner, so I was supposed to put up half of the money and give it to this pharmacist or wherever he was, whoever he was.

Q. So, did you give money to James? A. I didn't have any money to get together for him. The hustling was slow. I had used all my money for the family. I gave it directly to my common-law wife, Mary.

Q. So, in spite of the fact, James decided to go ahead with the transaction anyway? A. Well, he said he would work something out and he probably could talk to the guy, and once he got it together we'd be able to make the deal.

[130] Q. When did you make the sale on the 25th? A. The sale was the night of the 25th. We had been, you know, a lot of phone calls all that day, I had been hanging around The Pud, and James and whoever he'd been talking to, other men, you

know, they had been calling, and calls came in to James, he didn't make calls just only, calls came to him.

Q. This sale was made to Officer Sawyer, the person who you subsequently found out was Officer Terry Sawyer, right? A. Right.

Q. He was in the company of Officer McDowell, Agent McDowell? A. Right.

Q. And the substance that you sold at this time on February 26th, this was given to you by James Gray? A. Yes, it was. On the way to the transaction, about one block from Delmar on Kingshighway, going towards Lindell, I don't know what the street is, we had just passed a little club that was closed or something, and he told me then, he said, "You better take the package now."

Q. He handed you a package? A. Right.

Q. Was it a tinfoil wrapper similar to these? A. Yes, it was bulky. It was heavy foil, I know, because my wife uses foil cooking.

[131] Q. You are not denying that you made a sale to Officer Sawyer? A. No, I'm not.

Q. Of a substance? A. No, I'm not.

Q. Now, did Officer McDowell make some type of test at the time that you delivered this substance to Officer Sawyer? A. On the night of the 25th, which was the first sale, as they said, I handed the package over to Terry, who was Agent Sawyer, for inspection, which he hadn't handed me any money, no transaction had been made at the time, I just handed him the package and told him, "Here it is," and he looked at it and he turned around and said, "Jim, you want to check it out?" and through checking it out, all I saw Jim do was take some type of long pin that had a flat end, flat enough for—I don't know what kind of pin it resembles, something like a quill pin that women use, a long pin, but it had a flat end, enough where he

could take some of the mixture out of the powder, and he was supported to be snorting it but he bent over in the back seat with James, James was in the back seat with him, and he bent down where I couldn't see him, so I'm just talking. Terry was holding my attention pretty well, talking about the money and so on, and the quality of the drugs I'm supposed to be selling, and all the time I'm thinking that Jim is snorting, or what they call snort- **[132]** ing, taking it up his nose to see what effect it would give. That was the test, as far as I understood it.

Q. And he told you that—Jim told you the substance was all right? A. No, he started sneezing. He said, "What you got in this stuff?" And I said, "That's the mixture on it," and I was kind of skeptical then, but he just said, "Well, it will do; it's all right." He said, "It's kind of weak." So I told him, I said, "You can get better stuff if you came up with bigger money," and, you know, this is when Terry took over the conversation and we started discussing a future deal.

Q. Did you discuss a future deal there in the car? A. Yes, we did.

Q. What arrangements did you make as to the future deal? A. Well, they wanted to do something the next day, which I wasn't sure we could be ready for after all the trouble that previous three days of getting this mixture together.

Q. That would have been February the 26th, is that right? A. Right.

Q. When did you finalize your plans? A. Well, on the way back, when they dropped us off on Delmar, they did drop us off, they turned around, we were facing away from Delmar on Kingshighway, and they turned around and went back towards Delmar on Kingshighway, and during that time **[133]** they discussed the fact of where they could contact me, we didn't have a phone in our apartment, the wife and I, so I told him they could call me at The Pud, and they asked me the number, James gave them the telephone number of The Pud, and they asked me

who to ask for, and I just told them Chuck, because that's the name I go—that's my name, or the name I go by, that's was enough, and during this time they asked me would they be able to get better quality dope, and I told him, I said, yes, I would have to probably make a trip for it or, you know, see somebody, I would have to make connections, I said, because they got—I just made an excuse, I told them they had gotten the last package of anything I had, so this way I could probably try to bide for time, I was—caught myself trying to get some extra time.

Q. Now, this conversation was taking place when? A. On the way back to Delmar.

Q. Did you talk to Officer Sawyer the next day, on the 26th, on the phone? A. Yes, I did.

Q. Would you relate the substance of that conversation? A. Well, he had told me he would call at a certain time. Well, my regular habit was to get up very early and go around The Pud and catch anybody I could on the pool table, try to make some money. I was around The Pud earlier all that morning, **[134]** Gus and I really, we were standing around waiting, and he finally called about 11:00, 12:00 o'clock, sometime in the afternoon, it was around 12:00 approximately, I don't know how close, but he called.

Q. Would you relate the conversation that you had with him? A. Well, he called and he pointed out the fact that he would be ready, he said he was ready with the money but he said he wouldn't be ready to make it down there in that area for about an hour, so I told him that this was good, I said, because I hadn't gotten ready yet, I had made a little contact but my people hadn't come through yet, and he just told me, he said, "Well, I'll call back and find out how things stand." This was the first call at The Pud, and before he got off the phone I let him know that there was another place I preferred him to call me, and it was across the street.

Q. What was the name of that place? A. This was Ja-Lo's Lounge, they had a better pool table, so I figured I would lay over there, have a little better action.

Q. How do you spell Ja-Lo? A. J-a hyphen L-o.

Q. Did you later that day receive a phone call from Officer Sawyer in Ja-Lo's Lounge? A. Yes, I did.

[135] Q. Would you relate what the subject of that conversation was? A. He told me he was ready to make the deal, and I told him I needed a little time—well, I didn't explain directly that I needed time, but this was the substance of me really trying to hold him off a little bit. Really, there had been another call, it was two calls to Ja-Lo's, it had to be, because the first call I tried to get some extra time; the second call is when I told him I was ready. But the first call, the girl at the lounge—what's her name?—Regina—answered the phone and she said that he had called for me, and then when I came back in—I wasn't in—but it was another call that she said she received, some guy named Terry had called for me is all that she said, and I told her, "Well, this is good, because I didn't want to talk to him," or anything, and I wanted to try to hold him off, and told her the next call, if she could, would she look out the door to make sure I wasn't on the street because I wanted to receive the next call.

Q. So, did you receive that call? A. Yes, yes, I did.

Q. Would you relate what the substance of that conversation was? A. Well, we discussed the time.

Q. That was Officer Sawyer? **[136]** A. Officer Sawyer.

Q. Go ahead. A. We discussed the time and we didn't go into the price too much, but we discussed the time of making this transaction, the place, the quality of the heroin supposedly, and quantity, and really a few other general comments.

Q. So again at this point, from your standpoint, you were just participating in a charade, is that correct? A. Yes, because

James was gone at this present time to secure the stuff. This is why I'm trying to get the put on me because James had been gone all morning, he had been gone since before 12:00.

Q. Where did you think James was going to get the substance? A. He was supposed to be going to get some dope on Sarah and Olive—in the area of Sarah and Olive, because I had kind of finagled that information out of him overnight, he had gotten high, he said he had gotten high and he looked high, as far as I know, I have been addicted myself and he had all the appearance of just having shot up some dope or something, but he said he was all right, and we were sitting in his room talking, and he told me he had some people up on Sarah and Olive that he had gotten pretty close to and he figured he could make a good deal with them.

[137] Q. At this point what did you understand him to mean by the terms of what he was about to get? Did you understand what he was about to get? A. This was supposed to be the people for the pollutant.

Q. And not heroin? A. No, because this pollutant thing was what steadily impressed in my mind—he steadily impressed in my mind was this strong additive over all this other compound to really, you know, strengthen this fake dope.

Q. Now, when did you see James on the 25th—26th, rather, and receive from him the substance that you later sold to Officer Sawyer? What time of day was this? A. When he finally came back, I guess it was about 4:00 o'clock, approximately.

Q. Had you seen James earlier in the day? A. Right, at The Pud. Well, I got him up out of his bed that day, and he was kind of reluctant to come on out, but I kind of pulled him, told him, "Come on, let's go ahead and get this last money, because this is probably it." I really kind of wanted to cut the deal because I was—I didn't want to make over two deals with these white guys, especially two days in a row. I figured by

them being close maybe they wouldn't have a chance to fill it out, and know that we had duped them.

Q. So did you have to give James—did James ask you **[138]** for any money when you were in this hotel room? A. No, he just told me he had shot up most of his money and he was pretty low, so I told him I would put in his part that he had to pay for the pollutant, it was supposed to be $30.00, for what we were trying to get worth for this pollutant. Street price was approximately $6.00 a pill, or capsule, whatever they call it, and we wanted five of them to strengthen up this big batch we were supposed to be having this time.

Q. Big batch of what? A. Of this mixture, this Archie's compound, or this pharmacist's compound, whoever Archie came from, I don't know, but we had this already, and we needed pollutant because I didn't want to go and have this guy Jim test it again, you know, go sneezing, you know, and maybe come out, I don't know what might have happened.

Q. So you did give James some money? A. Right, in front of The Pud, and this is when he was trying to catch a cab, and Gus called a friend of his, it was a friend of Gus that was driving this cab that James got into go and get the pollutant; supposedly anyway.

Q. And then James later returned? A. He returned, and he had some brown substance in some tinfoil and it was a real small amount, and I just asked him, I said, "Well, this is all you get for," you know, "$30.00?" **[139]** and this is when we got into kind of a light argument, and he was acting high, so I figured he had went and shot up some of the money and dope and got some of the pollutant——

Mr. Dye: Your Honor, I'll object.

The Court: I'll sustain the objection; the portion about what he supposed and all will the stricken and the jury instructed to disregard it.

Q. (By Mr. Lang) So, James gave you these tinfoil packets? A. Yes, he did.

Q. How many did he give you? A. He gave me two, two small packets, very small, nothing like the size of those exhibits.

Q. And these are the packets that you later took and sold to Officer Sawyer and McDowell down at Maryland and Kingshighway? A. No, these are the packages that were dumped in this big compound and mixed all up, sifted it through and everything.

Q. Who did this mixing up? A. James and I sat in his room and did it.

Q. And then you transferred them to smaller packages, is that what happened? A. Transferred it to one larger package; in other words, the compound was in one large package, and these two small packages, the one he had opened up and showed me this small amount, **[140]** well, he had another one, and when we finally got up in his room he just comes out with this other one and said, "Well, this is all of it," which still didn't satisfy me, but we mixed it up in the big package and put it all together in the big package. First we opened and sifted it out, we took it out of all the foil and sifted it through one of the girl friend's stockings with a hanger, and just kept sifting it through, trying to make sure the pollutant would mix up, or supposedly pollutant.

Q. What type of container or wrapper was the stuff in that you sold to Officer Sawyer on the 26th? A. In a tinfoil wrapper.

Q. Who put it in the tinfoil wrapper? A. James fixed it up after I finished sifting it.

Q. You did in fact sell a substance to Officer Sawyer on the 26th? A. Yes.

Q. Did you know at any time either on the 25th or the 26th of February that you were selling heroin? A. No, I did not know.

Q. Did you ever intend to sell heroin to Officer Sawyer or anyone else? A. No, this was the fake out; I thought I was selling some kind of compound with pollutant in it, which I don't know **[141]** what pollutant is till today.

Mr. Lang: I have no further questions.

You may inquire.

The Court: Excuse me just a second, Mr. Dye, maybe we will have a ten-minute recess.

(Whereupon, short recess was taken, after which the trial proceeded as follows:)

The Court: Mr. Dye?

Mr. Dye: Thank you, your Honor.

Cross-Examination

By Mr. Dye

Q. Mr. Hampton, I believe you testified that your version of this incident is that you were setting up a deal with counterfeit substances, is that correct? A. Yes, sir.

Q. And I think you stated that you had risen to the position of vice-president of the Jaycees when you were in the penitentiary in North Carolina? A. Yes, sir.

Q. Do you think that is consonant with the position which you reached in the Jaycees in North Carolina? A. To an extent, sir, yes.

Q. Oh, is it really. Now, I think you stated also that you had had several jobs after you came back to Chicago from Vietnam **[142]** is that correct? A. Yes, sir.

Q. You were fired on the first two, but that you quit on the other? A. Yes, sir.

Q. And I think you also stated that you were convicted of armed robbery in North Carolina, is that correct? A. Yes, sir.

Q. What was your sentence on that? A. Full sentence was 28 to 30 years and four to five years.

Q. And what happened at the end, during your serving of that sentence, which made you want to escape? A. Well, I felt that the program that I was in, I was being—I was going to be terminated.

Q. Oh, I see, and you just thought since the program was terminated there wasn't any need for you to hang around, then? A. No, it wasn't on that level. I thought that I would be terminated from the program, not the program terminated.

Q. I see. So the thought of your not continuing your education was just so great that you couldn't stand to be in prison anymore? A. No, sir.

[143] Q. What was it, Mr. Hampton, what was your problem? A. The fact if I was terminated from the program for any menial, small violation of the penal regulations, that I would be returned to the close custody in the prison walls, which is called central prison.

Q. Isn't that just what I got through asking you? A. I don't know how you asked it; would you ask it again?

Q. The thought of going out of that program and going back into the general population was just to great for you to bear, isn't that true? A. Yes, sir.

Q. Now, your version is that Mr. Hutton was the mainspring behind all this, is that right? A. Yes, sir.

Q. And you, by your statement earlier, I think you stated that you had been addicted to heroin in Vietnam? A. Yes, sir.

Q. And so you know what heroin is, don't you? A. Yes, sir, I do.

Q. And you had no way of knowing in these three transactions that you had dealings with, the first with I believe the individual by the name of Frankie? A. Yes, sir.

Q. And the counts in this indictment, you had no way of **[144]** knowing that material was not heroin? A. I didn't test it, sir.

Q. I think you stated that Mr. Hutton's statement was that the substance which you had sold to Frankie on the first buy, and to the agents on the second and third buys, contained pollutant, is that correct? A. They call it pollutant in the street.

Q. And I think you also testified that he put some snuff in it? A. This was the sale on the 25th, the second transaction.

Q. Did you hear the chemist testify yesterday? A. Hear the who?

Q. The chemist. A. Yes, sir, I did.

Q. Did he say anything about snuff in any of the analyses? A. No, I didn't, I didn't hear him mention any other compounds.

Mr. Lang: Your Honor, may we approach the bench?

(Whereupon, discussion was had off the record at the bench, in the presence but out of the hearing of the jury.)

The Court: I'll overrule the objection. He can answer the question if he can.

Would you repeat the question?

(Whereupon, the reporter read the last question and **[145]** answer.)

Q. (By Mr. Dye) Now, did you ever—I think you made a "burn", what is called in the vernacular, with Frankie, is that correct? A. Yes, I did.

Q. Did you ever try to contact Frankie again to make another buy with him? A. No, I didn't.

Q. Why didn't you? A. I was afraid that there might be some trouble, physical violence.

Q. For what reason? A. For burning him for his money.

Q. And you were contacted on the 26th, I believe, by Agent Sawyer, is that correct? A. Yes, I was.

Q. And that was to make arrangements for a second transaction? A. Yes.

Q. So apparently you didn't feel like Mr. Sawyer would be any problem to you, since you burned him by your statement on the 25th, you didn't think that he was going to give you any trouble on the 26th, is that correct? A. Yes, sir.

[146] Q. So in the one instance you didn't want to contact the guy because you burned him, right? A. Yes, sir.

Q. But in this instance you thought you burned him, with Agent Sawyer, you thought you burned him on the first transaction with him, but yet you entered into another transaction, is that correct? A. Yes, sir, he said he was satisfied.

Q. Now, weren't you a little edgy when you made this deal on the 25th, as far as being found out as to the fact that that substance was, by your claim, was not heroin? A. Yes, sir, I was slightly edgy, but like I said, they were white, and James said they had been burnt before.

Q. I don't want to know what James said, I'm just interested in what you have to say. I think you stated that you were very satisfied with the results of the burn with Frankie, is that correct? A. Yes, sir, the money, financially.

Q. And why did you need the money? A. Well, I didn't have a job.

Q. You wanted to get a job then or what? A. I had already secured a job, that week, of these two sales.

Q. I thought earlier in your testimony you stated that **[147]** you couldn't get a job and that was the reason why you entered into this in the first place. A. I had a job but I wasn't working yet, I was due to go to work on Friday of that week I got arrested on the 26th, which was the 26th.

Q. You didn't say that in your direct, did you? A. I wasn't asked.

Q. Well, you didn't say it? A. No.

Q. I think your statement is that this transaction, or these three transactions were initiated by your remark to Mr. Hutton, or Mr. Gray, inquiring of Mr. Hutton if he knew of a way to make clean money? A. Yes.

Q. What has happened here by your claim that you didn't know this was heroin, then, was that clean money? A. What, the transaction?

Q. Yes. A. It was clean money behind the fact that I didn't have to do anything illegal. I was dealing with the underworld as far as I was concerned.

Q. What is the vernacular term for what you did to, say, Frankie? Is there a specific term? A. Not directly as far as more than a burn.

[148] Q. Well, how about ripping off? Would that be an accurate description? A. Right.

Q. And that is clean? A. That is clean money because you're not dealing with the police, you don't have police trouble; you're dealing with underworld people.

Q. So if you weren't dealing with anybody other than police—well, let me ask you this. Strike that.

Let me ask you this: If you were dealing with just a common ordinary citizen, would that be a burn? A. You wouldn't deal with a common ordinary citizen buying dope.

Q. Oh, really? A. Not that I know of.

Q. And as far as you know where did the first mention of the introduction into your relationship between yourself and Mr. Hutton, where did that introduction take place? A. At The Pud Tavern, Lounge, Pud Lounge.

Q. I think you stated that you shot pool together quite a bit? A. We were together approximately three weeks before this first transaction, or the first transaction that I'm indicted on, excuse me.

[149] Q. I'm sorry, would you please repeat? A. The first transaction that I'm indicted on, that I'm charged with. This Frankie thing came about 12, 15 days, almost two weeks after I first met him.

Q. I think you also stated that Mr. Hutton approached you with a fellow named Kenney and L.C., in the Pud Tavern one night, is that right? A. Yes, he did.

Q. What was the substance, if you would enlighten us, as to the conversation at that time? A. Well, he brought—pointed out that he had a setup, he wouldn't mention specifically what it was in front of L.C. because he was skeptical about him, as he said later, but he waited until L.C. got out of our presence, then he brought the conversation to Kenney and myself about a deal with a guy that had been burnt that would take another burn if we could set him up.

Q. Let me ask you this: Is Kenney here today? A. No, Kenney isn't.

Q. Is L.C. here today? A. No, he's not.

Q. Why aren't they here, do you know?
Mr. Lang: Your Honor, I object.

The Court: I'll sustain it as to the form of the **[150]** question.

Q. (By Mr. Dye) I think you stated also that after the first buy, the first burn in your statement, was successful that you quote tried to solicit further involvements of this kind using what you have said to be "turkey" substances with Mr. Hutton; did you solicit? A. If he could come up with another one, I needed more money, I did bring the point to him, yes.

Q. So your position then is you didn't know the stuff was heroin, right? A. At no time.

Q. And I think you are claiming, if I understand it, you are claiming you were entrapped in this? A. That's the legal term my attorney told me about; I just brought the circumstances.

Mr. Lang: Your Honor, I object to the use of the word "entrapped."

The Court: Sustained, order the answer stricken, the jury instructed to disregard it.

Q. (By Mr. Dye) I think you also stated that your friend Gus was told by Jule that he wanted—that Jule wanted you to be his main man? A. That what? Repeat the question.

Q. That Jule wanted you to be his main man. Did Jule **[151]** say anything to Gus Logwood about that? A. No, not that I know of. I'm not sure. I didn't hear anything of that nature.

Q. And this Gus that you have been referring to, is that the individual who testified earlier today? A. Yes, he is.

Mr. Dye: No further questions, your Honor.

Oh, just a few.

Do you know what is the term for "dizzope", do you know what that means?

A. That's a term, street term used for dope.

Q. And "spizoon," s-p-i-z-o-o-n, do you know what that is? A. That's a street term used for spoon.

Mr. Dye: No further questions.

The Court: Mr. Lang?

Redirect Examination

By Mr. Lang

Q. You testified that in one of the drug transactions that was taking place James put some snuff in the compound, is that right? A. Yes, as far as I knew; this was in his room.

Q. Now, which transaction were you referring to, the sale to Frankie, the first sale to Terry or the second sale to Terry? **[152]** A. This would have been the first sale to Terry, when Jim started sneezing.

Q. You say that it was snuff; how do you know it was snuff? A. He had a canister in his room that looked like a snuff canister. I'm using his term, snuff. That's all I thought would be in it.

Q. You don't know for a fact that it was snuff; you just assumed it was snuff? A. I just assumed it because it was brown looking like snuff.

Q. Mr. Dye asked you if you knew in fact why one of the individuals that was a witness to a prior conversation you had with James was not present in the courtroom, named Kenney. Do you know where Kenney is now? A. I don't know, but my wife asked me why wouldn't he testify, and I asked her would she check on it. She said that Kenney was in some police trouble or something.

Mr. Dye: I object to that as hearsay.

Mr. Lang: Mr. Dye opened up the question.

Mr. Dye: If he wants to impeach his witness, that's fine.

The Court: I'll sustain the objection and order the answer stricken and the jury instructed to disregard it, on the **[153]** grounds it's hearsay as to what his wife said. If he knows——

Mr. Lang: I don't have any further questions.

Your Honor, I do have one other question.

Chuck, would you describe what heroin looks like? A. The heroin I have seen since I have been back, since I have been out of the penitentiary, has been brown. Before that it was usually white, a white powdery flour-like substance.

Q. Looks like flour, sugar? A. Looks like flour, regular flour; now it's brown, though, they have it brown now as far as I know.

Q. Did you at any time taste or test any of the substances that you were selling to any of these people? A. No, sir, I did not.

Q. Why didn't you?

Mr. Dye: Your Honor, I will object. I think this is beyond the cross scope.

The Court: Sustained.

Q. (By Mr. Lang) When you were setting up the second counterfeit transaction with Agent Sawyer, you had already made one transaction with him, right? A. Yes, sir.

Q. And in your mind the second transaction was a counterfeit transaction as well, right? A. Yes, sir, it was.

[154] Q. Why weren't you afraid of Officer Sawyer, setting him up?

Mr. Dye: Your Honor, I object. I think the witness has already answered.

The Court: I think he has too, but I'll let him answer once more. Overruled.

Go ahead and answer the question.

The Witness: Would you repeat the question, please?

Q. (By Mr. Lang) Why weren't you afraid of making another sale to Officer Sawyer after you had set him up the first time? A. Sir, there was several reasons involved. First, that

he was white, he could not have have easy access to the area, because it was an all black area, as far as I could see, and he had expressed satisfaction, or his tester had, the tester was the other agent, McDowell, or Jim, and he expressed satisfaction, although he claimed it was weaker than what he had expected, but his expressed satisfaction made me believe the fake stuff was good enough to at least try again, and then after that I wouldn't worry because this was supposed to be the big sale.

Q. James told you this person was an experienced buyer that offered to sell you the——

Mr. Dye: I'll object, your Honor. This is a leading **[155]** question.

The Court: I'll sustain the objection.

Q. (By Mr. Lang) Just a few more questions.
Who initiated all of the sales that you made to Officer Sawyer?

Mr. Dye: I think we've gone over this.

The Court: I think it's repetitious. Sustained.

Mr. Lang: I have no other questions.

The Court: Do you have anything further, Mr. Dye?

Mr. Dye: No further questions, your Honor.

The Court: You may step down.

(Witness excused.)

The Court: We will be in recess until 1:30.

(Whereupon, the court was in recess until 1:30 o'clock p.m. of Tuesday, May 7, 1974.)

TUESDAY AFTERNOON SESSION, MAY 7, 1974

Pursuant to adjournment as aforesaid, at 1:30 o'clock p.m. of Tuesday, May 7, 1974, the court reconvened, present and presiding as before, and the trial proceeded as follows:

(Whereupon, the following proceedings were had out of the presence and hearing of the jury:)

The Court: Mr. Lang, have you rested?

Mr. Lang: Yes.

The Court: Defense has rested.

PLAINTIFF'S REBUTTAL TESTIMONY

(Whereupon, plaintiff, to rebut the testimony offered by defendant, offered testimony, oral and documentary, and made admissions as follows, to-wit:)

JULE HUTTON,

being produced, having been previously sworn, testified in rebuttal as follows:

Direct Examination

By Mr. Dye

The Court: Mr. Hutton, I will remind you that you testified earlier in this case and under oath, and that that oath still applies.

Q. (By Mr. Dye) Mr. Hutton, could you briefly tell the court and the jury in your relationship with the defendant when the question of narcotics was first discussed? A. The question of narcotics was first discussed in The Pud Tavern on the evening of February 25, 1974.

[174] Q. What, if any, conversation ensued between you and the defendant? A. Before the conversation started, I was play-

ing a game of pool and he was standing there next to the wall, and I was dressed in a short-sleeved shirt, slacks, where my arms were visible, and he saw some tracks.

Q. What do you mean by "tracks"? A. Needle marks from using heroin before.

Q. What if anything did he say in response to seeing your tracks, as you call them? A. Well, after I lost a game of pool, myself and Mr. Hampton engaged in conversation where he stated that he needed some money, and he knew some people that had heroin he could get, and I told him, I said, "I know some people that would be interested in buying some."

Q. What if anything else did you say? What did he say after that? A. Well, he then told me, said, "Well, why don't you try and get in touch with those people and let me know what happens?"

Q. Did you have occasion to see him at The Pud Tavern after that? A. Yes, I did.

Q. Approximately what day was this, do you recall? A. No, I can't recall exactly, but it was during the **[175]** middle of the week.

Q. What, if anything, happened when you met him in the middle of the week? A Well, after I had talked to him about—when he told me he could get the heroin, I then called Special Agent Sawyer at the DEA office where I told him that I had made a contact with the guy that I know as Michael Byers, and he stated he could get some heroin and he would be willing to sell.

Q. Did in any of your meetings at the tavern, were you ever approached by the defendant and did he ever inquire of you as to the people that you were talking about earlier in your conversations with him? A. No, no more than he had asked me did I know him and I told him yes, I did, and they was cool.

Q. Did he ever approach you and ask you—telling you that he had gotten a package and could you get in touch with—— A. Yes, he did.

Q. What was that all about, if you could tell us? A. It was late in the afternoon, I don't know the exact time, but he told me that he had got the heroin and asked me had I talked to those people, and I told him yes, I had, but I had to call them. "I got to call them back because he was at work," which I was meaning a normal working job, not a special job, anything.

[176] Q. So, then, if I understand it correctly, the first mention of heroin was by the defendant? A. Yes, it were.

Q. Let me ask you this: At any time in your engagement with the defendant did you ever have occasion to give him any heroin? A. No, I did not.

Q. Did you ever have occasion to give him any counterfeit substances? A. No, I did not.

Q. Did you ever give him any money to buy any of these things? A. No, I did not.

Q. Did you ever give him any money to buy any of these things? A. No, I did not.

Mr. Dye: No further questions, your Honor.

The Court: All right, Mr. Dye.

Mr. Lang?

Cross-Examination

By Mr Lang

Q. Now, you testified Mr. Hampton saw some tracks on your arms? A. Yes, I did.

Q. How long do tracks on your arm usually remain after you have used drugs? A. I used drugs from 1957 until some part of '60. They **[177]** last for a lifetime.

Q. You still have tracks on your arms? A. Yes, I do.

Q. You say the first conversation you ever had with Chuck about drugs was in The Pud Tavern on February 25th, is that right? A. Yes, I think it were; that's right.

Q. You never had a conversation with him earlier with respect to selling drugs to a man named Frankie? A. Yes, I did.

Mr. Dye: Your Honor, I think this is beyond the scope of my direct examination.

The Court: I know it is, but I will let him inquire.

Overruled. Go ahead.

Q. (By Mr. Lang) Well, then, your last statement was not true then that you never had a prior discussion with him about drugs, about a narcotics transaction? A. I was speaking about the narcotic transaction that happened on February 25th.

Q. That's not what I asked you about, though. I asked you had you had any prior conversation—— A. And I answered yes, I did.

Q. What was the substance of that conversation that you had with him regarding Frankie and the drug transaction?

[178] The Court: Well, now, wait a minute. I think now we're going beyond it, and I will direct you to question relating to matters—it's all right to have him explain the answer, and I think you elicited it in the proper fashion as far as the other.

Q. (By Mr. Lang) Now, your statement here that prompted Chuck's attention or put into his mind the question that you might know something about drugs was the fact he saw tracks on your arm, is that right? A. Repeat.

Q. Saw some tracks on your arm and that's what prompted his attention to engage in this conversation about drugs, is that right? A. I don't understand. Repeat that, will you?

Q. You just said that Chuck saw some tracks on your arm and because he saw these, therefore, he asked you did you know anything about to whom he could sell some narcotics? A. Well, first he asked me, he was telling me that he needed some money, and he mentioned—he mentioned heroin, said he could get some that he would be willing to sell. So I told him that I knew some people that would be willing to buy it.

Q. When did he mention the tracks on your arm? A. He never did mention the tracks. I say I was wearing a short-sleeved shirt and the tracks were visible.

[179] Q. You don't know that he saw the tracks or not? A. No, I assumed that he did.

Mr. Lang: I don't have any further questions.

The Court: All right, Mr. Lang.

Mr. Dye?

Mr. Dye: Just a few.

Redirect Examination

By Mr. Dye

Q. Since you have been back in St. Louis, have you used heroin? A. No, I have not.

Mr. Dye: No further questions.

The Court: Anything further, Mr. Lang?

Mr. Lang: No.

The Court: You may be excused.

(Witness excused.)

[197] (Whereupon, the following proceedings were had in chambers, out of the presence and hearing of the jury:)

The Court: On the record, let it be shown that we are going over the instructions with the agreement between counsel and

the court that counsel need not make any further objections at the completion of the court's reading of same to the jury, that, in other words, the objections, if any, made by counsel at this time will stand as their objections to the instructions unless otherwise noted and objected to.

Is that correct, Mr. Lang?

Mr. Lang: That's correct.

The Court: Is that correct, Mr. Dye?

Mr. Dye: That's correct.

The Court: The first instruction I intend to give—and gentlemen, express any objection, and if you want to make a record on that other question, Mr. Lang, wait till the end—is the "Members of the Jury" instruction.

Next would be the "Burden of Proof, Presumption of Innocence, and Reasonable Doubt."

Next, "consider the instructions as a whole, don't single out one."

Next, "The indictment is not evidence of guilt."

Next quotes the statutes and the indictment.

Next, the elements instruction.

Next instructs the jury to consider each act **[198]** separately, et cetera.

Next, definition of "distribute" and "deliver".

Next, definition of "knowingly".

Next is requirement of proof of specific intent.

Next is the one on circumstantial evidence.

Next, "heroin is a controlled substance."

Next, the quantity of heroin, et cetera.

Next, expert witnesses.

Next, "Evidence of defendant's previous conviction of a felony is to be considered by the jury," et cetera.

Next, "testimony of a witness may be discredited," et cetera, by showing conviction of a felony.

Next, "testimony of an informer."

Next, "The law does not compel a defendant to take the stand, imposes no duty on defendant to testify or call witnesses."

Next, "defendant, however, is a competent witness," et cetera.

Next is the credibility of witness' instruction.

Next is weight of evidence not determined by number of witnesses.

Last is the instructions concerning the verdict forms and then the verdict form.

There's no objection to any of those instructions by either party, am I correct?

[199] Mr. Lang: It is correct.

Mr. Dye: No objection.

The Court: Now, Mr. Lang, you have filed a motion that has not been ruled upon until this time relating to an entrapment instruction?

Mr. Lang: That's correct.

The Court: Do you desire to stand on that motion at this time or do you want the court to rule on it?

Mr. Lang: I don't want to stand on the motion; I would request a ruling from the court at this time.

The Court: After consideration of Mr. Lang's motion, which is on record, and it is entitled, "Defendant's Motion for a Special Jury Instruction on the Defense of Entrapment," I will overrule that motion and accordingly will not give the

proposed instruction on entrapment because it is the opinion of the court that under the evidence of this case and the law regarding entrapment that such instruction would be improper.

* * * * * * *

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[200] (Closing arguments of counsel are not included herein.)

COURT'S CHARGE TO THE JURY

The Court: Members of the Jury:

You have heard all of the testimony in this case and argument of counsel and it now becomes the Court's duty to give you the law that should govern you in your deliberation in reaching a verdict in this case.

The law applicable to this case is given to you in these instructions. It is your duty to follow all instructions. They will only be given to you orally, as I am now doing. You should bear in mind that while it may appear from time to time that I am giving you special instructions, that is not correct. The instructions I give should be received by you to apply as a whole. Don't attempt to separate and disregard part of them and use and apply the remainder.

Faithful performance by you of your duties is vital to the administration of justice. It is your duty to determine the facts, and to determine them from the evidence and the reasonable inferences arising from such evidence, and in so doing you must not indulge in guesswork and speculation.

The evidence consists of the testimony of witnesses, stipulation of counsel, and the exhibits admitted in evidence. The admission of evidence in court is governed by rules of law. From time to time it has been the duty of the attorneys to make **[201]** objections and my duty as Judge to rule on those

objections and whether you can consider certain evidence. You must not concern yourself with the objections or the Court's reasons for these rulings. You must not consider testimony or exhibits to which an objection was sustained or which has been ordered stricken.

Opening statements and closing arguments of the attorneys are intended to help you in understanding the evidence and applying the law, but they are not evidence.

You must not be influenced in any degree by any personal feeling of sympathy for or prejudice against any party to this suit, for each party is entitled to the same fair and impartial consideration.

It has been and will be the Court's purpose to express no opinion upon the facts in this case, for that is the sole province of the jury, and if you have thought at any time during the trial that the Court has indicated any opinion with respect to the facts, you may disregard it, because I have meant nothing by voice or manner to indicate any opinion upon what is or is not a fact in this case, and if at any time during this charge you get the impression that the Court is indicating his own view with respect to the facts, remember that is not at all conclusive upon you. You and you alone shall determine what the facts are in this case.

This is a criminal case, as you know. The burden **[202]** to make out the guilt of the defendant on trial in this case is upon the government; that burden the government assumes in the beginning and carries throughout to the end, until it has met it by showing to you the guilt of the defendant beyond a reasonable doubt. The law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

All of the presumptions of the law, aside from the evidence, are in favor of innocence and the defendant is presumed to be

innocent until proven guilty. This presumption of innocence attends and protects the defendant throughout the trial until it has been met and overcome by evidence coming forward in the case which shows and establishes the defendant's guilt beyond a reasonable doubt. Unless you find the defendant guilty beyond a reasonable doubt, you shall acquit them.

It is not required that the government prove guilt beyond all possible doubt. The test is one of reasonable doubt. A reasonable doubt is a doubt based upon reason and common sense—the kind of doubt that would make a reasonable person hesitate to act. Proof beyond a reasonable doubt must, therefore, be proof of such a convincing character that you would be willing to rely and act upon it unhesitatingly. Putting it in another way, a reasonable doubt means a doubt based on reason and not the mere possibility of innocence.

In your deliberations you are not to single out one **[203]** instruction alone, but instead consider the instructions as a whole.

The indictment is not to be considered by the jury as any evidence of the defendant's guilt. It ought not, in your minds, create even a suspicion of guilt upon his part. It is merely the manner by which the case is brought before you, for your consideration, and the fact that an indictment has been returned is not to be considered as any evidence of the guilt of the defendant.

Prosecution in this case is based upon a statute which is Federal law. The statute upon which this prosecution is based reads, in pertinent part, as follows:

> ". . . It shall be unlawful for any person knowingly or intentionally . . . to . . . distribute . . . a controlled substance."

The Indictment brought under this statute reads as follows:

"The Grand Jury charges:

"That on or about the 25th day of February, 1974, in the City of St. Louis, State of Missouri, within the Eastern Division of the Eastern District of Missouri, Charles Hampton, a/k/a Michael Byers, knowingly and intentionally did distribute approximately 1.5092 grams of heroin, a Schedule I narcotic drug controlled substance.

[204] "In violation of Title 21, United States Code, Section 841(a)(1).

"Count II

"The Grand Jury further charges:

"That on or about the 26th day of February, 1974, in the City of St. Louis, State of Missouri, within the Eastern Division of the Eastern District of Missouri, Charles Hampton a/k/a Michael Byers, knowingly and intentionally did distribute approximately 1.8854 grams of heroin, a Schedule I narcotic drug controlled substance.

"In violation of Title 21, United States Code, Section 841(a)(1)."

The essential elements of these offenses, each of which the government must prove beyond a reasonable doubt, are:

First: That the defendant distributed heroin, a controlled substance; and,

Second: That the defendant did so knowingly and intentionally.

The Court instructs the jury that as you have noted a separate crime or offense is charged in each count of the indictment. Each offense and the evidence applicable thereto should be considered separately. The fact that you may find the accused guilty or not guilty of one of the offenses charged **[205]** should not control your verdict with respect to any other offense charged.

The term "distribute" means to deliver . . . a controlled substance.

The term "deliver" means the actual or constructive . . . transfer of a controlled substance.

The term "knowingly" as used in these instructions means that the act was done voluntarily and purposely and not because of a mistake or accident. Knowledge may be proved by the defendant's conduct and by all the acts and circumstances surrounding the case. No person can intentionally avoid knowledge by closing his eyes to facts which should prompt him to investigate.

The crime charged in this case is a serious crime which requires proof of specific intent before the defendant can be convicted. Specific intent, as the term implies, means more than the general intent to commit the act. To establish specific intent the government must prove that the defendant knowingly did an act which the law forbids, purposely intending to violate the law. Such intent may be determined from all the facts and circumstances surrounding the case.

Intent may be proved by circumstantial evidence. It rarely can be established by any other means. While witnesses may see and hear and thus be able to give direct evidence of what a defendant does or fails to do, there can be no eye- **[206]** witness account of the state of mind with which the acts were done or omitted. But what a defendant does or fails to do may indicate intent or lack of intent to commit the offense charged.

You are instructed as a matter of law that heroin is a controlled substance. You must ascertain whether or not the material in question was in fact heroin. In so doing you may consider all evidence in the case which may aid in the determination of that issue, including the testimony of any expert or other witness who may testify either to support or to dispute the allegation that the material in question was heroin.

In the indictment, it is alleged that a particular amount or quantity of heroin was involved. The evidence in the case need not establish that the amount or quantity of heroin was as alleged in the indictment, but only that some measurable amount of a heroin drug was in fact the subject of the acts charged in the indictment.

The rules of evidence ordinarily do not permit witnesses to testify as to opinion or conclusions. An exception to this rule exists as to those whom we call "expert witnesses". Witnesses who, by education and experience, have become expert in some art, science, profession, or calling, may state an opinion as to relevant and material matter, in which they profess to be expert, and may also state their reasons for the opinion.

[207] You should conseider each expert opinion received in evidence in this case, and give it such weight as you may think it deserves. If you should decide that the opinion of an expert witness is not based upon sufficient education and experience, or if you should conclude that the reasons given in support of the opinion are not sound, or that the opinion is outweighed by other evidence, you may disregard the opinion entirely.

Evidence of a defendant's previous conviction of a felony is to be considered by the jury, only insofar as it may affect the credibility of the defendant as a witness, and must never be considered as evidence of guilt of the crime for which the defendant is on trial.

The testimony of a witness may be discredited or impeached by showing that the witness has been convicted of a felony, that is, of a crime punishable by imprisonment for a term of years. Prior conviction does not render a witness incompetent to testify, but is merely a circumstance which you may consider in determining the credibility of the witness. It is the province of the jury to determine the weight to be given to any prior conviction as impeachment.

The testimony of an informer, or any witness whose self-interest or attitude is shown to be such as might tend to prompt testimony unfavorable to the accused, should always be considered with caution and weighed with great care.

[208] The law does not compel a defendant in a criminal case to take the witness stand and testify, and no presumption of guilt may be raised, and no inference of any kind may be drawn, from the failure of a defendant to testify.

As stated before, the law never imposes upon a defendant in a criminal case the burden or duty of calling any witnesses or producing any evidence.

A defendant who wishes to testify, however, is a competent witness; and the defendant's testimony is to be judged in the same way as that of any other witness.

You, as jurors, are the sole judges of the credibility of the witnesses and the weight their testimony deserves.

You should carefully scrutinize all the testimony given, the circumstances under which each witness has testified, and every matter in evidence which tends to show whether a witness is worthy of belief. Consider each witness' intelligence, motive and state of mind, and demeanor and manner while on the stand. Consider the witness' ability to observe the matters as to which he has testified, and whether he impresses you as having an accurate recollection of these matters. Consider also any relation each witness may bear to either side of the case; the manner in which each witness might be affected by the verdict; and the extent to which, if at all, each witness is either supported or contradicted by other evidence in the case.

[209] Inconsistencies or discrepancies in the testimony of a witness, or between the testimony of different witnesses, may or may not cause the jury to discredit such testimony. Two or more persons witnessing an incident or a transaction may

see or hear it differently; and innocent misrecollection, like failure of recollection, is not an uncommon experience. In weighing the effect of a discrepancy, always consider whether it pertains to a matter of importance or an unimportant detail, and whether the discrepancy results from innocent error or intentional falsehood.

After making your own judgment, you will give the testimony of each witness such credibility, if any, as you may think it deserves.

The weight of the evidence is not necessarily determined by the number of witnesses testifying on either side. You should consider all the facts and circumstances in evidence to determine which of the witnesses are worthy of greater credence. You may find that the testimony of a smaller number of witnesses on one side is more credible than the testimony of a greater number of witnesses on the other side.

I have caused to be prepared for you, ladies and gentlemen, a blank form of verdict. You will use the form that I shall submit to you for both Count I and Count II whether you find the defendant guilty or not guilty.

You must make a finding as to each count. When you **[210]** have unanimously agreed upon the verdict, you will insert the words "guilty" or "not guilty" as to each count as you may find and believe from all the evidence.

You have nothing to do with the punishment, that is for the Court. Your sole duty is performed when you have found upon the question of guilt or innocence of the defendant.

When you have unanimously agreed upon the verdict, one of your number will sign the verdict form as foreman and return it into Court.

Mr. Zickler.

Ladies and gentlemen, I will ask you to follow Mr. Zickler, who will lead you to the jury room where you may begin your deliberations.

* * * * * * *

United States District Court, Eastern District of Missouri
Eastern Division

(Title omitted in printing)

DEFENDANT'S MOTION FOR A SPECIAL JURY INSTRUCTION ON THE DEFENSE OF ENTRAPMENT

(Filed July 9, 1974)

Comes now defendant Charles Hampton, Jr., and moves that the Court to give the following charge to the jury, in words or in substance (hereinafter referred to as Defendant's Proposed Jury Instruction No. 1):

The defendant asserts that he was the victim of entrapment as to the crimes charged in the indictment.

If you find that the defendant's sales of narcotics were sales of narcotics supplied to him by an informer in the employ of or acting on behalf of the government, then you must acquit the defendant because the law as a matter of policy forbids his conviction in such a case.

Furthermore, under this particular defense, you need not consider the predisposition of the defendant to commit the offenses charged, because if the governmental involvement through its informer reached the point that I have just defined in your

own minds, then the predisposition of the defendant would not matter.

If, on the other hand, the jury should find beyond a reasonable doubt from the evidence in the case that the defendant's sales of narcotics were not sales of narcotics supplied to him by an informer in the employ of or acting on behalf of the government, and further, that before anything at all occurred respecting the alleged offenses involved in the case, the defendant was ready and willing to commit crimes such as charged in the indictment, whenever opportunity was afforded, and that Government officers or their agents did no more than offer the opportunity, then the jury should find that the defendant is not a victim of entrapment.

(Signature omitted in printing)

(Overruled, Nangle)

United States District Court, Eastern District of Missouri
Eastern Division

(Title omitted in printing)

ORDER

(Filed July 17, 1974)

It is hereby ordered that Defendant's Motion for a Special Jury Instruction on the Defense of Entrapment, hereintofore submitted to the Court and overruled during the course of the trial of this cause, but erroneously omitted from the record, is

hereby made a part thereof, and the Clerk is directed to make an appropriate entry in the minutes of the Court's records.

Dated: 7/17/74

/s/ JOHN F. NANGLE
Judge

United States Court of Appeals for the Eighth Circuit

No. 74-1416 September Term, 1974

The United States, Appellee, vs. Charles Hampton, a/k/a Michael Byers, Appellant.	Appeal from the United States District Court for the Eastern District of Missouri

JUDGMENT

(Filed January 9, 1975)

This cause came on to be heard on the original files of the United States District Court for the Eastern District of Missouri and briefs filed by the respective parties and was argued by counsel.

On Consideration Whereof, it is now here ordered and adjudged by this Court that the judgment and commitment of the said District Court in this cause be and the same is hereby af-

firmed in accordance with the majority opinion of this Court this day filed herein.

December 11, 1974

United States Court of Appeals
For the Eighth Circuit

No. 74-1416

United States of America, Appellee, v. Charles Hampton, Also Known as Michael Byers, Appellant.	Appeal from the United States District Court for the Eastern District of Missouri.

Submitted: October 15, 1974.

Filed: December 11, 1974.

Before Heaney, Bright, and Ross, Circuit Judges.

Bright, Circuit Judge.

Charles Hampton stands convicted after a jury trial on two counts of distribution of heroin in violation of 21 U.S.C. § 841 (a)(1). The district court sentenced Hampton to five years imprisonment and a three-year parole term on each count, to be

served concurrently, but suspended the prison sentence and placed him on probation for five years. Hampton brings this appeal. We affirm the conviction.

Hampton raises two errors on appeal: (1) The trial court erred in refusing to give defendant's special instruction on entrapment, *i.e.*, if the Government in fact provided Hampton with the heroin in question by its informer, the policy of the law forbids conviction,[1] and (2) the trial court erred in permitting a special agent of the drug enforcement administration to state that the substance which had been obtained from defendant "contained heroin."

I.

We turn first to the entrapment defense as it is presented to us on this appeal. Hampton and the Government's informer, one Jules Hutton, became pool-playing friends in St. Louis. According to Hampton, he (Hampton) proposed a plan for selling a "pollutant"—a non-narcotic compound closely resembling heroin in appearance—to gullible acquantances of Hutton. Hampton testified that the plan was carried out. Informer-Hutton supplied Hampton with packets containing alleged pollutants rather than narcotics and Hampton effected two sales to friends of Hutton. These friends turned out to be federal narcotics agents. The alleged pollutant turned out to be genuine heroin.

[1] Appellant requested the following special instruction:

> The defendant asserts that he was a victim of entrapment as to the crimes charged in the indictment.
>
> If you find that the defendant's sales of narcotics were sales of narcotics supplied to him by an informer in the employ of or acting on behalf of the government, then you must acquit the defendant because the law as a matter of policy forbids his conviction in such a case.
>
> Furthermore, under this particular defense, you need not consider the predisposition of the defendant to commit the offenses charged, because if the governmental involvement through its informer reached the point that I have just defined in your own minds, then the predisposition of the defendant would not matter.

Hutton, as a Government witness, testified that Hampton had initiated the idea of selling heroin. He specifically denied giving Hampton the substances that Hampton sold to Government agents.

On this appeal, appellant makes the following statement of his entitlement to the special entrapment instruction:

> [That request] is based on what has been termed the "Government Conduct Theory" of entrapment which has its origins in the separate opinion of Mr. Justice Roberts for himself and two other Justices in *Sorrells v. United States*, 287 U.S. 435 (1932) and the concurring opinion of Mr. Justice Frankfurter, for himself and three other Justices, in *Sherman v. United States*, 356 U.S. 369 (1958).

Appellant recognizes that the Supreme Court has recently rejected a "Government conduct" theory of entrapment in *United States v. Russell*, 411 U.S. 423 (1973), but he nevertheless argues that such a theory may represent a proper basis for an entrapment defense where, as here, the defendant's version of the evidence discloses that the Government supplied the contraband without which there would be no crime.

In *United States v. Russell, supra*, an undercover narcotics agent supplied essential ingredients needed in the manufacture of an illegal drug, methamphetamine ("speed"). Russell and his codefendants were charged with unlawful manufacture, processing, and sale of that drug. Russell offered a defense of entrapment as a matter of law. He was convicted upon a jury trial. On appeal, the Ninth Circuit reversed the conviction for "an intolerable degree of governmental participation in the criminal enterprise." *United States v. Russell*, 459 F.2d 671, 673 (9th Cir. 1972). The Supreme Court on writ of certiorari

reversed and, in doing so, reaffirmed that the entrapment defense focuses essentially "on the intent or predisposition of the defendant to commit the crime." *United States v. Russell*, 411 U.S. at 429.

The respondent-Russell contended that the Ninth Circuit had properly expanded the traditional notion of entrapment to require a dismissal because of the extensive Government participation in perpetrating the alleged crime. Russell rested his claim on two theories: (a) that entrapment exists whenever the Government supplies contraband to the defendants[2] or (b) that entrapment exists when a Government investigator becomes enmeshed in criminal activity to such a degree that prosecution of the defendants is repugnant to the American criminal justice system.[3] The Court rejected these theories in *Russell* and refused to set aside the theory of the entrapment defense as based solely on predisposition and as explicated in the majority opinions in *Sorrells v. United States*, 287 U.S. 435 (1932), and *Sherman v. United States*, 356 U.S. 369 (1958).

Justice Rehnquist, speaking for the majority in *Russell* said:

> This Court's opinions in *Sorrells v. United States, supra,* and *Sherman v. United States, supra,* held that the principal element in the defense of entrapment was the defendant's predisposition to commit the crime. Respondent conceded in the Court of Appeals, as well he might, "that he may have harbored a predisposition to commit the charged offenses." 459 F.2d, at 672. Yet he argues that the jury's refusal to find entrapment under the charge submitted to it by the trial court should be overturned and the views of Justices Roberts and Frankfurter, in *Sorrells* and *Sherman*, respectively, which make the essential element of

[2] *See United States v. Bueno*, 447 F.2d 903 (5th Cir. 1971); *United States v. Chisum*, 312 F. Supp. 1307 (C. D. Cal. 1970).

[3] *See Greene v. United States*, 454 F.2d 783 (9th Cir. 1971).

> the defense turn on the type and degree of governmental conduct, be adopted as the law.
>
> We decline to overrule these cases. *Sorrells* is a precedent of long standing that has already been once reexamined in *Sherman* and implicitly there reaffirmed. [411 U.S. at 433.]

We believe that the Supreme Court's opinion in *Russell* forecloses us from considering any theory other than predisposition with respect to Hampton's entrapment defense.

We recognize that the Fifth Circuit in *United States v. Bueno*, 447 F.2d 903 (1971), held that entrapment is established as a matter of law to a charge of possessing or distributing contraband where such contraband was supplied to the defendant by a Government agent or a paid informer. In that circuit the following rules are applied: (1) Where the Government does not rebut defendant's testimony that an informer in the employ of the Government furnished the defendant the contraband, entrapment as a matter of law is established. *United States v. Bueno, supra,* 447 F.2d at 906. (2) Where the Government disputes that a Government agent or informer has furnished the contraband to the defendant, the issue is left to the jury under a special instruction to the effect that in order to convict "the jury must find beyond a reasonable doubt that the defendant did not obtain the contraband in question from the undercover agent." *United States v. Mosley*, No. 73-3336 (5th Cir., July 5, 1974), slip op. at 5395. *See United States v. Oquendo*, 490 F.2d 161 (5th Cir. 1974). The Fifth Circuit believes that its rulings pertaining to entrapment have not been eroded by the Supreme Court decision in *Russell*. *United States v. Oquendo, supra,* 490 F.2d at 163.

Prior to the decision in *Russell*, the Seventh Circuit, in common with the Fifth Circuit, had applied the entrapment defense in a case of extensive Government participation in the crime.

It held entrapment applicable to a defendant charged with counterfeiting when the evidence disclosed that federal agents participated in the scheme to the extent of arranging for and supervising the actual printing of counterfeit bills, and also determining how and when those bills would be delivered to the defendant. *United States v. McGrath*, 468 F.2d 1027 (7th Cir. 1972). The Supreme Court granted certiorari, vacated the judgment, and remanded for reconsideration in light of *United States v. Russell*. *United States v. McGrath*, 412 U.S. 936 (1973). On remand, the Seventh Circuit applied *Russell* as controlling law on appeal and held that the defense of entrapment was not available to the defendant. The court added: "We also conclude that the government agents' involvement here does not amount to the type of outrageous conduct, 'shocking to the universal sense of justice,' which *Russell* suggests might preclude prosecution on due process principles." *United States v. McGrath*, 494 F.2d 562, 563 (7th Cir. 1974).

In the present case, even under the theory offered by Hampton, Hampton made sales to third parties of substances which he represented as heroin. In light of the Supreme Court's decision in *Russell*, and the Seventh Circuit's decision in *McGrath*, we do not think that the extent of Government participation in the commission of the crime, under the facts claimed by Hampton, warrants an entrapment defense based upon Government conduct, apart from defendant's predisposition.

We believe this is a case where classic entrapment principles as explicated in *Russell*, *Sherman*, and *Sorrells* should apply, for even under Hampton's testimony, Hampton carried out the crucial acts of selling the heroin substantially on his own.[4] The

[4] Here, the jury in effect rejected Hampton's factual predicate for an intrapment defense based either upon a theory of Government conduct or upon a theory of lack of pre-disposition. Such defense would rest solely on Hampton's testimony. The court submitted the question of Hampton's intent to the jury. Hampton testified that he lacked criminal intent because Hutton had supplied a substance which the latter had represented as a pollutant. Hutton disputed that version of the facts. The jury, by returning a guilty verdict, necessarily accepted Hutton's testimony and rejected that of Hampton, and, in effect, rejected any basis for an entrapment defense.

district court, however, gave no instruction whatsoever on entrapment. Appellant has not urged the failure to give the standard entrapment instruction as error, conceding on oral argument the existence of predisposition in this case. Thus, in this appeal we are not called upon to determine whether the trial court erred in failing to give an entrapment instruction different from that which Hampton requested.[5]

II.

We have reviewed the record relating to testimony by Government agent James D. McDowell in which the agent described the substance delivered to him by Hampton as containing heroin. The trial court properly overruled the objection to the testimony for lack of foundation and hearsay. Agent McDowell related an extensive background of experience in training and performing field tests to determine the presence of heroin in a substance suspected of containing contraband. McDowell described the chemical test performed and the chemical reaction obtained from the test. From this reaction, he concluded that the tested

[5] Appellant's counsel on appeal, who was also counsel at trial, has made it very clear that he does not seek a new trial for Hampton on the basis of any error in the failure to give the standard entrapment instruction, but only for failure by the trial court to give the special instruction requested during the trial. In light of defendant's concession on oral argument that predisposition existed, a standard entrapment instruction would not have materially assisted Hampton in his defense. We note that the trial court has dealt leniently with Hampton. While imposing five-year prison sentences to be served concurrently, the court has stayed the imposition of the sentences and placed Hampton on probation while he serves a prison term under a North Carolina state conviction for armed robbery. Consequently, the failure to give any entrapment instruction will not be deemed error here.

substance contained heroin. Clearly, the trial court required the Government to lay an adequate foundation for McDowell's expert testimony, which was defined and limited in scope. His opinion thereafter was properly received into evidence. We find no error. *United States v. Atkins*, 473 F.2d 308, 313-314 (8th Cir.), *cert. denied*, 412 U.S. 931 (1973).

Affirmed.

Heaney, Circuit Judge, dissenting.

I would have this Circuit adopt the Fifth Circuit rule that entrapment is established as a matter of law to a charge of possessing contraband or distributing contraband to a government agent, where such contraband was supplied to the defendant by a government agent, including a paid informer. *See United States v. Oquendo*, 490 F.2d 161, 162-164 (5th Cir. 1974); *United States v. Bueno*, 447 F.2d 903 (5th Cir. 1971). Since the government here came forward with sufficient evidence contradicting the defendant's allegations, the jury ought to have been instructed that it must find beyond a reasonable doubt that the defendant did not obtain the contraband from the government agent. Accordingly, I would reverse and remand for a new trial.

I cannot agree with the majority that the Supreme Court's opinion in *United States v. Russell*, 411 U.S. 423 (1973), "forecloses us from considering any theory other than predisposition." For that case explicitly acknowledged that there may be cases where government conduct is "so outrageous that due process principles would absolutely bar the government from invoking the judicial processes to obtain a conviction." *Id.* at 431-432. Predisposition is emphatically not a bar to the invocation of this due process defense.

On the contrary, I agree with the Fifth Circuit that the *Bueno* rule survives *Russell* because that rule is aimed precisely at the outrageous situation where

> * * * the government buy[s] heroin from itself, through an intermediary, the defendant, and then charg[es] him with the crime. * * *

United States v. Bueno, supra at 905.

To hold, as the majority seems to say, that *Russell* emasculated *Bueno*, is to overlook the fact that the *Russell* Court specifically noted that the facts in *Russell* did not fall within the *Bueno* rationale because the chemical supplied to defendant Russell was not itself contraband. *United States v. Russell, supra* at 432.

Not even the Supreme Court has focused so rigidly and exclusively on predisposition as this Court does today. In the future, it is difficult to see how any defendant in this Circuit can possibly raise the due process defense which the *Russell* Court sought to leave open. I respectfully dissent.

A true copy.

Attest:

Clerk, U. S. Court of Appeals, Eighth Circuit

No. 74-5822

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IN THE SUPREME COURT OF THE UNITED STATES

ORIGINAL COPY OCTOBER TERM, 1975

CHARLES HAMPTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

BEST COPY AVAILABLE

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D. C. 20530

OCTOBER TERM, 1974

No. 74-6322

CHARLES HUTTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE EIGHTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App.) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on December 11, 1974. The petition for a writ of certiorari was filed on January 10, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether entrapment is established as a matter of law, regardless of predisposition, when contraband illegally sold by a defendant has been supplied by a government agent.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Missouri, petitioner was convicted on two counts of distributing heroin, in violation of 21 U.S.C. 841(a)(1). He was sentenced to concurrent terms of five years' imprisonment and three years' special parole on each count. The district court suspended imposition of sentence and imposed a term of five years' probation. The court of appeals affirmed, one judge dissenting (Pet. App.).

1. The government's case was based primarily on the testimony of Jule Hutton, a government informer. The government's evidence established the following:

On February 25, 1974, Hutton informed Special Agent Terry Sawyer that petitioner was willing to sell a "boil" of heroin for $155 (Tr. 32). Hutton then arranged a meeting with petitioner for that evening (Tr. 33). At the meeting place, petitioner and Hutton entered the automobile of Agents Sawyer and McDowell and, following a brief conversation, petitioner removed his hat and took out a tinfoil package, which he passed to Sawyer (Tr. 35). When Sawyer opened the package, its contents began to spill out (Tr. 36-37). Petitioner retrieved the package, opened it, and returned it to Sawyer (Tr. 37). Sawyer then passed the package to McDowell for testing (Tr. 38). McDowell tested the substance and returned it to Sawyer who paid petitioner after a brief conversation as to price and future transactions (Tr. 39-40).

On the following day, petitioner pursuaded Hutton to accompany him to another meeting with McDowell and Sawyer (Tr. 42-43). At the meeting, petitioner removed another tinfoil packet from his hat and handed it to Sawyer who again had McDowell test it. Thereafter, McDowell placed petitioner and Hutton under arrest (Tr. 44).

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Hutton had been a special employee of the United States government from 1961 to 1965 and again from 1972 until the time of trial, during which time he had participated in approximately 40 or 50 narcotics cases (Tr. 54). At trial, Hutton said that his first conversation with petitioner concerning drugs had been initiated by petitioner (Tr. 48). Hutton's testimony was corroborated by Agents Sawyer and McDowell to the extent it concerned matters that they had observed (Tr. 65-109).

2. Petitioner, testifying in his own defense, claimed that he had proposed a plan to Hutton for the sale of a "pollutant" - a non-narcotic substance closely resembling heroin - to gullible acquaintances of Hutton (Tr. 118-121), and that Hutton supplied him with the pollutant, which was then sold to two friends of Hutton (Tr. 130-132). The "friends" turned out to be federal agents, and the "pollutant" turned out to be heroin. In rebuttal, Hutton testified that the idea of selling the heroin had been initiated by petitioner and that he, Hutton, had not provided petitioner with any substance or money (Tr. 173-174, 176).

3. Petitioner did not request a standard entrapment instruction, but instead requested an instruction that would have required acquittal, regardless of petitioner's predisposition, if the jury found that the heroin sold to the special agents had been supplied by Hutton. 1/ The court refused the requested instruction. The court did, however, submit to the jury the issue of scienter raised by petitioner's testimony, and the jury found petitioner guilty. The court of appeals affirmed.

1/ Petitioner requested the following instruction (Pet. App. 2):

> The defendant asserts that he was a victim of entrapment as to the crimes charged in the indictment.
> If you find that the defendant's sale of narcotics were sales of narcotics supplied to him by an informer in the employ of or acting on behalf of the government, then you must acquit the defendant because the law as a matter of policy forbids his conviction in such a case.

(Cont'd)

DISCUSSION

Petitioner here contends that he was entitled to the requested instruction on the theory that the government's furnishing of contraband would constitute entrapment per se, i.e., that it is a deprivation of due process to convict a defendant of selling contraband that was supplied to him by a government agent.

1. In our view, petitioner was not entitled to the instruction he requested or, indeed, to submission of any defense of entrapment to the jury. In United States v. Russell, 411 U.S. 432, 435, this Court reaffirmed that the defense of entrapment comes into play "only when the Government's deception actually implants the criminal design in the mind of the defendant." The Court ruled that, where the defendant was predisposed to commit the crime with which he was charged, the defense of entrapment is not available. See also Sorrells v. United States, 287 U.S. 435; Sherman v. United States, 356 U.S. 369. Petitioner here has conceded that he was predisposed to commit the offense of selling narcotics. See Pet. App. 7 and n. 5. Accordingly, he was not entitled to an instruction based upon the theory of entrapment.

2. In urging that his requested instruction should have been given to the jury, petitioner relies upon this Court's observation in United States v. Russell, supra, 411 U.S. at 431-432, that "we

---

1/(Cont'd)

> Furthermore, under this particular defense, you need not consider the predisposition of the defendant to commit the offenses charged, because if the governmental involvement through its informer reached the point that I have just defined in your own minds, then the predisposition of the defendant would not matter.

may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial process to obtain a conviction." Petitioner contends that this case presents such a situation. But even if petitioner were able to show that the informer Hutton had supplied him with the narcotics that he subsequently sold, that fact would not bar his prosecution. This Court in Russell gave clear indication that the mere supplying of contraband does not constitute a constitutionally intolerable degree of participation in the criminal enterprise (411 U.S. at 432):

> * * *[I]n drug-related offenses law enforcement personnel have turned to one of the only practicable means of detection: the infiltration of drug rings and a limited participation in their unlawful present practices. Such infiltration is a recognized and permissible means of investigation; if that be so, then the supply of some item of value that the drug ring requires must, as a general rule, also be permissible. For an agent will not be taken into the confidence of the illegal entrepreneurs unless he has something of value to offer them. Law enforcement tactics such as this can hardly be said to violate "fundamental fairness" or to be "shocking to the universal sense of justice" * * *.

3. There is, however, disagreement among the courts of appeals concerning the issue raised by petitioner. Most of the courts of appeals that have considered the matter have concluded, like the court below, that the mere supplying of contraband by a government agent does not constitute entrapment per se or otherwise bar the defendant's prosecution. See United States v. Spivey, decided January 8, 1975, No. 74-1140 (C.A. 10) petition for a writ of certiorari pending, No. 74-5971; United States v. McGrath, 404 F. 2d 562 (C.A. 7); United States v. Johnson, 488 F. 2d 165 (C.A. 9), certiorari denied, 414 U.S. 1116. Cf. United States v. Fenton, 486 F. 2d 1262 (C.A. 2). On the other hand, the Fifth Circuit has determined that, notwithstanding the Russell decision, "the law of this Circuit is that a defendant, where entrapment is an issue, may be acquitted for lack of predisposition, or, even though disposed, where the undercover agent supplies him with the contraband." United States v. Mosley, 496 F. 2d 1012, 1016. See also United States v. Gomes-Rojas, decided February 10, 1975, No. 74-1914 (C.A. 5); United States v. Oquendo, 490 F. 2d 161 (C.A. 5); United States v. Bueno, 477 F. 2d 903 (C.A. 5). The Third Circuit has now apparently joined the Fifth in this view. See United States v. West, decided February 25, 1975, No. 74-1279.

We believe that this conflict among the courts of appeals should be resolved by this Court. The question whether government agents are barred from furnishing contraband to participants in illegal ventures is one of considerable importance to effective law enforcement, for the furnishing of contraband may in some instances be the only practical means of infiltrating drug rings or of achieving effective surveillance of their resale activities. Moreover, since defendants frequently allege that government agents furnished them with the contraband that they later illegally sold, the question raised by petitioner affects a substantial volume of litigation. Accordingly, although we believe that the decision below is correct, we support petitioner's request for review.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.

ROBERT H. BORK
Solicitor General

MARCH 1975.

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Supreme Court, U. S.
FILED
JUN 3 1975

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1974

No. 74-5822

CHARLES S. HAMPTON,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals
for the Eighth Circuit

BRIEF FOR PETITIONER

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CHARLES S. HAMPTON,
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On Writ of Certiorari to the United States Court of Appeals
for the Eighth Circuit

BRIEF FOR PETITIONER

CITATIONS TO OPINIONS BELOW

The December 11, 1974 opinion of the United States Court of Appeals for the Eighth Circuit is not yet reported and appears in the Appendix at page 107.

JURISDICTION

The judgment of the Court of Appeals was entered on December 11, 1974 (A. 106). The Petition for a Writ of Cer-

tiorari was filed January 10, 1975 and certiorari granted on March 31, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

1. Whether due process forbids conviction of an accused for selling contraband, regardless of predisposition, when contraband illegally sold by the accused has been supplied by a government agent?

CONSTITUTIONAL PROVISION INVOLVED

This case involves the Due Process Clause of the Fifth Amendment to the Constitution of the United States:

> No person shall be . . . deprived of life, liberty, or property without due process of law . . .

STATEMENT

The petitioner, Charles Hampton, was charged in a two-count indictment, with violations of Section 841(9)(1), Title 21, United States Code, to wit: knowingly and intentionally distributing a total of approximately three grams of heroin. Trial was held in the United States District Court for the Eastern District of Missouri before the Honorable John F. Nangle on May 6 and 7, 1974, resulting in a jury verdict of guilty as to both counts. (A. 2). On May 24, 1974, Hampton was sentenced to five years imprisonment and a three-year special parole term on each of the two counts. The imposition of sentence was suspended and Hampton was placed on probation for five years conditioned upon his remaining in the custody of the North Carolina prison

system during the period of his probation (A. 2). Hampton, during the dates covered in the indictment and up until the sentencing, had been an escaped prisoner from the North Carolina prison system and was returned there to serve the remainder of his sentence on state charges.

At trial, the government introduced the testimony of five witnesses in its case in chief and three witnesses in rebuttal. Only the testimony of three of the government's chief witnesses and one rebuttal witness is before this Court. Hampton, likewise, introduced the testimony of five witnesses including himself, but only his testimony appears in the record.

The first witness to testify for the government whose testimony is before the Court was Jule Hutton (A. 4). Hutton testified that he had known Charles Hampton and identified him in court. Hutton further testified that on the evening of February 25, 1974, he called Special Agent Terry Sawyer and told Sawyer that Hampton was willing to make a sale of a "foil" of heroin for $155.00 (A. 6). The telephone call had been placed from the Pud Tavern and further conversation led to an arranged meeting (A. 6-7). At approximately 9:00 P.M. Hampton left the tavern and returned approximately ten or fifteen minutes later stating that everything was all right (A. 7). Approximately two hours later, Hutton and Hampton left the tavern and walked to the predetermined rendezvous (A. 7-8). After a few minutes, Special Agents Sawyer and McDowell drove up to the corner and engaged Hutton in conversation (A. 7). Hampton and Hutton entered the vehicle and after a brief conversation, Hampton removed a hat he was wearing and took out a tinfoil package which he passed to Special Agent Sawyer (A. 8-9). Sawyer began to open the package and the contents began to spill out, whereupon Hampton retrieved the package, opened it, and returned it to Sawyer (A. 9). Sawyer then passed the package to Special Agent McDowell who tested it for purity (A. 10). After the test and a brief conversation

as to price and future transactions, Sawyer paid Hampton an undetermined amount of money (A. 10-11). After these transactions, Sawyer drove Hutton and Hampton to the vicinity of Kingshighway and Delmar Boulevards where they left the automobile (A. 12). The next day, February 26, 1974, Hutton was contacted by Hampton and was persuaded by Hampton to accompany him to another intersection (A. 12-13). After arriving at that location Hutton and Hampton met Special Agents Sawyer and McDowell in Sawyer's car (A. 13). After a brief conversation, Hampton again procured from his hat a small tinfoil packet which he gave to Sawyer who in turn gave to McDowell for testing (A. 13-14). Thereafter Hutton and Hampton were placed under arrest by McDowell.

On cross-examination, Hutton testified that he had known Hampton approximately three or four days after he had arrived in town (A. 15-16) and that he had met Hampton at the Pud Tavern. He testified that he had used the alias "James Gray" throughout his relation with Hampton (A. 16-17). He further testified that the initial conversation concerning drugs had been initiated by Hampton (A. 18). Hutton also testified that he had been a special employee of the United States government in the years 1961 to 1965 and again from 1972 to the time of trial (A. 20). During that time Hutton testified that he had participated in approximately 80 or 90 narcotics cases as a special employee in Omaha, Nebraska, Wichita, Kansas, and St. Louis, Missouri (A. 20).

The next witnesses to testify were Special Agents Terry C. Sawyer and James D. McDowell (A. 27, 44). Their testimony generally corroborated the above stated testimony of Jule Hutton with reference to the times that Sawyer, McDowell, Hutton and Hampton were together (A. 27-57).

Thereafter, the petitioner called four witnesses, whose testimony is not set out in the record. The last defense witness to

testify was Hampton himself (A. 58). Hampton testified that soon after he arrived in St. Louis with his common-law wife and four year old son, he settled into an apartment building near the scene of the drug sales. Nearby in the neighborhood was the Pud Bar and Grille. At the Pud, a man who introduced himself as "James Gray" struck up his acquaintance (A. 63). Soon he and "Gray" became close friends, based on their mutual acquaintances in Chicago and their skill at playing pool (A. 63). Hampton was to later learn that "James Gray" was in reality, Jule Hutton, a special employee of the Drug Enforcement Administration of the government.

Hampton further testified that, Hutton, aware that he and his family were in serious financial straits, proposed a plan whereby they could both make some clean money (A. 64). Under this plan, Hampton testified, Hutton would obtain a quantity of counterfeit narcotics for sale to some supposedly gullible acquaintance of Hutton's in town from Colorado (A. 65). This substance would be obtained, Hutton told Hampton, from a friend of Hutton's who worked in a pharmacy (A. 65), and the substance thus obtained would simulate heroin in every apparent respect (A. 65, 66, 67, 68, 70, 76, 77).

Hampton testified that Hutton did subsequently deliver such a substance to him on or about February 25, 1974. At that time, Hampton testified, Hutton handed him a foil-wrapped package containing the substance that he soon after sold to Special Agent Sawyer (A. 71-73). During the transaction on February 25, 1974 Special Agents Sawyer and McDowell initiated the arrangements for another such transaction, to be consummated the following night, February 26, 1974 (A. 73).

Hampton testified that again, on February 26, Jule Hutton delivered to him a quantity of a substance that he sold later that evening to Special Agent Sawyer (A. 77-78). At that time, Hampton testified, Hutton delivered two small tinfoil packets to

him at Hutton's apartment (A. 78). Both Hutton and Hampton participated in the preparation of one large package of the substance from the two small tinfoil packets (A. 78). Hampton sifted the mixture through a nylon stocking, and Hutton wrapped the substance in tinfoil (A. 78). Again, Hutton testified that the substance he sold to Agent Sawyer on February 26, was the substance delivered to him by Hutton earlier in the day (A. 78).

On the government's rebuttal, Jule Hutton again took the stand and testified that at all times Hampton initiated and instigated the idea of selling heroin (A. 89-90) and that at no time did he give Hampton any substance or money (A. 91).

In chambers after closing arguments, the defense moved for a "special jury instruction on the defense of entrapment" (A. 95). This motion was denied, and the court gave the jury no instruction whatsoever on entrapment (A. 95-96).

At the close of all evidence, the cause was submitted to the jury (A. 103-104). After deliberation, the jury returned verdicts of guilty as to both counts (A. 2).

On appeal to the Court of Appeals for the Eighth Circuit, the court affirmed the judgment of the district court, finding no error in that court's refusal to give Hampton's requested instruction on entrapment.

SUMMARY OF ARGUMENT

This case presents a new problem that this court has not passed upon. The problem is: to what extent this court will sanction the activities of government law enforcement agents in creating crimes, in providing the very contraband without which there could be no crime. Three prior decisions of this court, *Sorrells, Sherman,* and *Russell, infra,* do not answer the problem

because they were concerned with the historic embodiment of entrapment, solicitation or inducement. The majority opinions in these cases focused on the intent or predisposition of the defendant to commit a crime, when what the government agent did was to provide the opportunity to do what the defendant already could do by himself. The instant situation involves the government far further in crime to the point of completing the link between the defendant's predisposition, and the completed crime by supplying the necessary element of the crime, the very contraband without which all of the petitioner's desires to commit a crime would be insufficient.

This court has condemned the government's soliciting crime when such activity starts with the government; it must, consistently, deny the government the right to prosecute when agents go further than solicitation and provide the contraband without which there could be no crime to prosecute.

The ground on which petitioner relies for asking this court to bar his prosecution is the due process clause of the Fifth Amendment. It is asserted that due process is violated in two ways when the government supplies contraband to the defendant.

First, there is necessarily an implied presumption relied on by the government to justify its conduct, that an individual predisposed to commit a contraband crime could and would have obtained the contraband on his own, without government intervention. It is this implied presumption that is at the heart of petitioner's due process attack. This court in a number of cases has placed due process limitations on the creation and effect of certain presumptions used by government. Although the decided cases to date have dealt only with statutory presumptions regarding criminal conduct, clearly due process limitations apply to any presumption on which the government relies. The basic test is that a presumption in a criminal context cannot be sustained if the relation between the proved fact and the ultimate

fact presumed does not exist beyond a reasonable doubt. Applying this test to the instant case, when the government supplies the contraband, the likelihood that the predisposed defendants would have committed a crime involving the contraband can never be proven beyond a reasonable doubt, since the contraband might have been totally unavailable to him from any other source.

The second way in which due process is violated by the government's supply of contraband to the accused is based on the proposition that the government has no legitimate interest in punishing a predisposed individual unless he has harmed another individual or society at large. Where the government has supplied the contraband to the defendant it has controlled the commission of the offense in such a manner that society is not harmed by the defendant's criminal act. Moreover, in exceeding the bounds of a legitimate governmental interest in supplying the *sine qua non* of the offense, conviction of the defendant is brought about by a method of law enforcement that offends a general sense of justice where law enforcement methods have exceeded certain decencies of civilized conduct, due process has historically been a bar to a prosecution arising out of that conduct.

ARGUMENT

I. The Trial Court Erred in Refusing to Instruct the Jury on the Defense of Entrapment as Requested, Because the Due Process Clause of the Fifth Amendment Forbids the Conviction of an Accused for Selling Contraband, if the Contraband Sold Was Supplied to the Accused by the Government.

A. Prior decisions by this court on the defense of entrapment do not preclude an examination of the issue raised in the instant case.

Hampton's proposed instruction on entrapment was not given to the jury by the district court as requested. It reads in relevant part:

> The defendant asserts that he was a victim of entrapment as to the crimes charged in the indictment.
>
> If you find that the defendant's sales of narcotics were sales of narcotics supplied to him by an informer in the employ of or acting on behalf of the government, then you must acquit the defendant because the law as a matter of policy forbids his conviction in such a case.
>
> Furthermore, under this particular defense, you need not consider the predisposition of the defendant to commit the offenses charged, because if the governmental involvement through its informer reached the point that I have just defined in your own minds, then the predisposition of the defendant would not matter.
>
> * * * * * * *

Hampton's proposed instruction is based on what has been termed the "Government Conduct Theory" of entrapment which has its origins in the separate opinion of Mr. Justice Roberts

for himself and two other justices in *Sorrells v. United States*, 287 U.S. 435 (1932) and the concurring opinion of Mr. Justice Frankfurter for himself and three other justices, in *Sherman v. United States*, 356 U.S. 369 (1958). Prior to this court's recent decision in *United States v. Russell*, 411 U.S. 423 (1973), *Sorrells* and *Sherman* were the only two decisions of this Court dealing with the theory of entrapment in the federal courts.

In *Sorrells, supra*, the defendant was charged with selling one half-gallon of whiskey in violation of the National Prohibition Act. A government agent had visited *Sorrells*, reminisced about their experiences in the same division during World War I, and after three requests, was sold a half-gallon of whiskey. *Sorrells* request for a jury charge on entrapment was denied by the trial judge.

This Court reversed the conviction and ordered a new trial. In an opinion written by Mr. Chief Justice Hughes, the majority framed an entrapment defense prompted by improper governmental conduct but available only to "otherwise innocent persons." The defense was based on an unexpressed intent of Congress to exclude from its criminal statutes the injustice that conviction of entrapped "innocents" would accomplish. Regardless of the nature and extent of the governmental activity the Court held, there is no entrapment if the defendant has the "predisposition" to commit the crime or if the "criminal design" originates with the defendant.

On the other hand, Mr. Justice Roberts, concurring in *Sorrells*, believed the true basis of entrapment was analogous to the equitable and civil law doctrine that courts should not "tolerate the use of their process to consummate a wrong" (287 U. S. at 455) (Roberts, J., concurring). Conviction of an entrapped defendant should be barred to protect the court's function of administering justice under its view. Thus, while Mr. Justice Roberts said that entrapment occurs "where a law

officer envisages a crime, plans it and activates its commission by one not theretofore intending its perpetration," he felt evidence of the accused's predisposition was a "false issue." (*Id.* at 454, 458). Once a defendant proved entrapment through inducement or instigation to commit the offense, Mr. Justice Roberts argued that it was the duty of the court to release the defendant immediately (*Id.* at 457). Mr. Justice Roberts' analysis thus required a determination of causation although he felt only police conduct should be examined.

In *Sherman* which presented this Court's next opportunity to review the entrapment defense, the facts were that the defendant and an agent met at a doctor's office where they were both being treated for drug addiction. After first refusing, Sherman secured some heroin for the agent and himself. Mr. Chief Justice Warren, writing for a majority of five, held there was entrapment as a matter of law, but specifically refused to reconsider *Sorrells* because the issues were not raised below or argued before the Court. The crucial questions—the basis for the doctrine and whether the focus is the government conduct alone or includes an evaluation of the individual defendant—were specifically left open by the Court.

Mr. Justice Frankfurter, however, in his concurring opinion in *Sherman* analyzed the entrapment doctrine basically in the same manner as Mr. Justice Roberts in *Sorrells*. He felt that the only true Congressional intent to be derived from a reading of a statute "is . . . to make criminal precisely the conduct in which the defendant has engaged" (356 U.S. at 379) (Frankfurter, J., concurring). And like Mr. Justice Roberts he believed that the reason why an entrapped defendant is freed is the judiciary's supervision of the administration of criminal justice in the federal courts, not the fact that the conduct was not criminal in a statutory sense (*Id.* at 380). Also like Mr. Justice Roberts, Mr. Justice Frankfurter believed that a determination of an accused's predisposition was irrelevant to the

question of entrapment and highly prejudicial to the defendant. His test to determine whether the government's conduct amounted to an entrapment was objective. Under his view, activity that encouraged the commission of a crime by a person other than one ready and willing to commit it was beyond the scope of proper governmental power and therefore constituted entrapment (*Id.* at 383-84).

Mr. Justice Frankfurter's sound and vigorous argument notwithstanding, the majority opinion in *Sherman* reiterated the dominant view to be followed by the majority of lower federal court decisions. See e.g., *Pierce v. United States*, 414 F.2d 163 (5th Cir. 1969), *cert. denied*, 396 U.S. 960 (1969); *United States v. Pugliese*, 346 F. 2d 861 (2d Cir. 1965); *United States ex rel. Hall v. Illinois*, 329 F. 2d 354 (7th Cir. 1964); *Gorin v. United States*, 313 F. 2d 641 (1st Cir. 1963). Having found sufficient evidence to infer predisposition, the courts generally avoided further inquiry into the propriety of government law enforcement conduct.

However, a marked departure from the norm occurred in a growing minority of federal cases. In these cases the courts involved allow entrapment as a defense despite the defendant's predisposition. Where the government's conduct consisted of supplying contraband to the accused, said contraband being the subject of the offense, every court that passed on the question prior to this Court's decision in *United States v. Russell, supra*, considered this entrapment as a matter of law, disregarding the predisposition of the defendant to commit the offense charged. *See, e.g., Green v. United States*, 454 F. 2d 783 (9th Cir. 1971); *United States v. Bueno*, 447 F.2d 903 (5th Cir. 1971), *cert. denied*, 411 U.S. 949 (1973); *United States v. Dillett*, 254 F. Supp. 980 (S.D.N.Y. 1966); *United States v. Chisum*, 312 F. Supp. 1307 (C.D.Cal. 1970). Additionally the decisions of several state courts adopted this view. *See e.g., State v. Boccelli*, 105 Ariz. 405, 467 P. 2d 740 (1970); *State v. Powell*, 181 S.E.2d 754 (N.C. App. 1971).

In 1973, in *United States v. Russell, supra*, this court was presented its third opportunity to review the theoretical underpinnings of the entrapment doctrine in the federal courts. Two major issues were considered: first, whether a finding of predisposition is dispositive of the entrapment defense; and second, if predisposition has been established, whether there remains an alternative basis for judicially limiting police inducement of criminal conduct.

The defendant in *Russell* was convicted of illegally manufacturing, processing, and selling a depressant or stimulant drug. He had been approached by a special agent of the Federal Bureau of Narcotics and Dangerous Drugs, who claimed to represent an organization seeking to control the illicit manufacture and distribution of methamphetamine on the Pacific coast. The manufacture of methamphetamine commonly known as "speed" requires as an essential ingredient a substance known as phenyl-2-propanone. At the time of the defendant's alleged violation, propanone was legal to manufacture, sell, and possess, but its purchase required a manufacturer's license. Its only use was as an ingredient for the manufacture of "speed." At the request of the Bureau of Narcotics and Dangerous Drugs, most suppliers had agreed voluntarily to discontinue its sale. The ingredient was therefore extremely difficult to obtain, legally or illegally. Shapiro, the agent who approached the defendant, offered to supply him with propanone in return for half of the "speed" to be produced from the propanone by the defendant. Shapiro, in fact, furnished one hundred grams of propanone, received half the product, and purchased part of the remaining half. About a month later, Shapiro returned to the premises where the manufacture had taken place and asked the defendant's accomplice whether they could continue the arrangement. The accomplice said he had obtained two additional bottles of propanone, but would be interested in further transactions with Shapiro when they were depleted. The accomplice then provided Shapiro with more "speed." Three days later Shapiro re-

turned with a search warrant and seized an empty 500 gram propanone bottle and a 100 gram bottle partially filled with the chemical, neither bottle being the one the agent had earlier provided.

The Court of Appeals for the Ninth Circuit overturned Russell's conviction taking the view that reversal was required regardless of whether one characterized overreaching government conduct as the gravamen of the entrapment defense or as an alternative defense. *United States v. Russell*, 459 F.2d 671 (9th Cir. 1972), *rev'd* 411 U.S. 423 (1973). The Ninth Circuit held that the "hopefully unique" conduct of Agent Shapiro was repugnant to the criminal justice system, violated fundamental concepts of due process, and amounted to the kind of overzealous law enforcement conduct which Mr. Justice Frankfurter had sought to prevent in *Sherman* (*Id.* at 673-74).

This Court, in a five to four decision, reversed the court of appeals. Writing for the majority, Mr. Justice Rehnquist noted the recurring conflict, first engendered by the Hughes-Roberts dichotomy in *Sorrells* as to whether the proper focus of an entrapment inquiry is the predisposition of the defendant or the government instigation of the crime. He concluded that, while the majority views in *Sorrells* and *Sherman* had been subjected to criticism for their logical and procedural shortcomings, those 2 cases had themselves conclusively responded to those criticisms. 411 U.S. at 433-434. Furthermore, he stated that the arguments supporting the minority view were found subject to "at least equally cogent criticism." *Id.* at 434. He stated, therefore, that entrapment is, as the previous lead cases had established, a "relatively limited defense," one designed to curb excessive government conduct, but to carry out the intent of Congress as Mr. Chief Justice Hughes had described it. *Id.* at 435.

Mr. Justice Rehnquist then turned to the independent defense accepted in *Greene, supra*, which the court of appeals had suggested was essentially the same as the entrapment defense because both were "based on fundamental concepts of due process and [evinced] the reluctance of the judiciary to countenance 'overzealous law enforcement' " 459 F.2d at 679, *cited* in *United States v. Russell*, 411 U.S. 423, 428 (1973). In rejecting the argument that government provision of a non-available, essential element to the production of a contraband product constitutes a per se denial of due process, the Court indicated that its main reason for doing so was because the facts of *Russell* indicated that the bottles of propanone seized by Shapiro pursuant to his warrant established that the defendant had a source of the chemical independent of the government (*Id.* at 431). Thus, in the Court's view, Shapiro merely provided the chemical to an enterprise already in progress, prompting the Court to state, ". . . The law enforcement conduct here stops far short of violating that fundamental fairness, shocking to the universal sense of justice, mandated by the Due Process Clause of the Fifth Amendment (*Id.* at 432).

Hence, despite the actual holding in *Russell*, this Court specifically recognized that in an appropriate case, due process may bar a criminal prosecution, stating:

> . . . we may some day be presented with a situation in which the conduct of law enforcement agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction . . .

The instant case, therefore presents a fundamental and exceedingly important question of policy and justice and is a case of first impression for this court. To what extent will the courts sanction the activities of government law enforcement

agents in creating crimes by providing the contraband without which there could be no crime? The court of appeals below took the position that it was foreclosed from considering this question by *Russell*. On the other hand, the Fifth Circuit has reaffirmed its pre-*Russell* position that ". . . a defendant, where entrapment is an issue may be acquitted . . . even though disposed, where the undercover agent supplies him with the contraband," *United States v. Mosley*, 496 F.2d 1012, 1016 (5th Cir. 1974); *United States v. Oguendo*, 490 F.2d 161 (5th Cir. 1974). *Russell* does not reach this issue because as previously stated, there a government agent merely provided some narcotics manufacturers with a necessary ingredient which, although difficult to obtain, was legal to possess and which had in fact been obtained independently by the defendant. In the case at bar, however, Hampton's testimony, if true, showed that the government was involved in the crime to the point of supplying the heroin itself, without which any desire on Hampton's part to commit the subject offense would be insufficient.

B. The government's supply of contraband to the accused is a contributing cause of the accused's criminal act of such magnitude that it can never be determined fairly within bonds of due process whether the accused would have obtained and sold such contraband without the government's intervention.

In the instant case, Hampton through his testimony raised the issue that the government manufactured the crime by supplying the controlled substances. Indeed, there was no evidence adduced at trial on behalf of the government to indicate where or how Hampton could have obtained the alleged heroin. The inability to acquire such a drug would clearly have deterred him from becoming involved in the criminal venture. As this court stated explicitly in *Sherman*, "The function of law enforcement

is the prevention of crime and the apprehension of criminals. Manifestly that function does not include the manufacturing of crime." 356 U.S. at 372.

Thus it is Hampton's primary contention that the correct way to analyze the problem in this case is not to regard it as an entrapment case at all, but to question whether he received due process by the acts of the government agent in providing him with the very contraband he is prosecuted for selling.

The cases of entrapment, heretofore considered by this Court, culminating with *Russell*, have been limited to the question of solicitation or inducement. The situation at bar is considerably different and requires a different analysis. In the solicitation cases, the governmental function involves inducing the accused to do what he was not previously disposed to do. Yet, in this case, assuming the accused did have the intent to commit the acts, Hampton's testimony indicates that the government went far further than providing him with the opportunity to do the acts—the government agent provided Hampton with the very illegal substances without which there would be no crimes with which to charge him. The United States government, acting through its employee, has literally created a crime because it provided the missing link between whatever intent he arguably had to commit a crime and the ability to carry out that desire. It is this conduct which Hampton asks this Court to condemn. It is Hampton's position that there is both a qualitative difference between solicitation and the type of conduct that his testimony alleges occurred.

Petitioner believes that the cases previously cited and upon which he relies. *United States v. Bueno, Greene v. United States, United States v. Chisum, United States v. Dillet*, and *State v. Bocelli, supra*, can best be analyzed if they are considered from the due process point of view, rather than attempting to fit them into the entrapment doctrine and, if that is true, there are several lines of cases that support this contention.

The most relevant body of law deals with constitutional limitations on the creation and effect of certain presumptions. In *Tot v. United States*, 319 U.S. 463 (1943) this court stated the basic tests to be used in determining the constitutionality of statutory presumptions in criminal laws. In *Tot*, the defendants were convicted under a provision of the Federal Firearms Act that made it "unlawful for any person convicted of a crime of violence . . . to receive any firearm . . . which [had] been shipped . . . in interstate . . . commerce" and further provided that "the possession of a firearm . . . by any such person [is] presumptive evidence that such firearm . . . was . . . received by such person in violation of [the] Act." 319 U.S. at 464. In holding that the presumption violated due process, this court stated that "a statutory presumption cannot be sustained if there be no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience." *Id.* at 467-68. The Court noted that, although state laws might make acquisition difficult, it did not follow from proof of mere possession that the firearms must have been received by the defendants in interstate, as opposed to intrastate, commerce subsequent to the adoption of the federal statute. *Id.* at 468.

In a later case, *Turner v. United States*, 396 U.S. 348 (1970), this court appears to have gone beyond the requirement that the proved fact must tend to prove the presumed fact rationally. It seems to have adopted the standard that the presumed fact must actually exist beyond a reasonable doubt. See C. McCormick, Evidence § 344 at 816 (2d ed. 1972); Christie & Pye, *Presumptions and Assumptions in the Criminal Law: Another View*, 1970 Duke L. J. 919, 923-24. Although the decided cases to date have dealt only with statutory presumptions, one noted authority is clearly of the opinion that "theoretically due process problems may arise with regard to any presumption

[upon which the state relies] . . ." C. McCormick, *supra*, note 93, § 344 at 811.

The instant case presents a situation highly analogous to *Tot* and its progeny. Probably the only rationale that can be offered by the government for the practice of supplying contraband that is the *sina qua non* of the offense to the accused, is the existence of a high probability that the accused would commit a similar offense in the future. Under this view, the supply of contraband to the accused is justified by his alleged criminal propensity to commit a crime involving the contraband. However, petitioner submits, that when the government supplies the contraband, the likelihood that the defendant would commit the crime cannot be known or established within the bounds of rationality established in *Tot*. Certainly it does not follow as a matter of logic that one predisposed to commit a crime involving contraband will do so if the contraband is otherwise totally unavailable to him, or if he might encounter extreme difficulty in obtaining it. And certainly such a presumption does not exist beyond a reasonable doubt as is required by *Turner, supra.* To a limited extent the government may prescribe potential criminality, but this area of governmental power has narrow limits. *Scales v. United States*, 367 U.S. 203, 224-25 (1961). And as one commentator has noted, "At the present time, scientific methods are too unreliable to ascertain criminal propensity and 'dangerousness' with sufficient accuracy to meet the test of due process." Comment, *The Defense of Entrapment: A Plea for Constitutional Standards*, 20 Fla. L.R. 63, 72 (1967).

In a strictly different context this same point was made by Mr. Justice Jackson as Circuit Judge in granting bail to convicted Communists who were awaiting decision on a petition for *certiorari*:

> If I assume that defendants are disposed to commit every opportune disloyal act helpful to Communist countries, it is still difficult to reconcile with traditional Amer-

ican law the jailing of persons by the courts because of anticipated but as yet uncommitted crimes. Imprisonment to protect society from predicted but unconsummated offenses is so unprecedented and so fraught with danger of excesses and injustice that I am loath to resort to it, even as a discretionary judicial technique to supplement conviction of such offenses as those of which defendants stand convicted. ***Williamson v. United States,*** 184 F.2d 280 (2d Cir. 1950).

Clearly, for the government to supply contraband makes it all but impossible to determine whether a given defendant would have sold it without the official source of supply and the fact that he may have been predisposed to commit the offense is not a sufficient link in the causal chain leading to the completed offense from which to draw such an inference fairly, within the bounds of due process.

C. **By supplying contraband that is the subject of the offense, the government acts outside the scope of any legitimate government interest and offends a community sense of fair play and decency so as to violate due process.**

Any law enforcement practice that goes beyond solicitation to the extent of supplying an indispensable and illegal element of crime, not otherwise available to an accused, is a violation of due process, because the due process clause permits deprivation of liberty only in order to accomplish a legitimate objective of society. *See West Virginia State Bd. of Educ. v. Barnette,* 319 U.S. 624, 636 (1943). Even though an accused may be predisposed to commit a particular offense, there is no governmental interest in punishing him because of his moral guilt unless he has harmed another individual or society at large. Since a solicited contraband offense in which the government has supplied the contraband is contrived and

controlled by the law enforcement authorities, it is difficult to see how it could be harmful to society.

An examinaiton of the policies which lie behind the defense of entrapment, as it has been recognized by this Court, illuminates the policies underlying the decisions of the other courts that have passed on this precise issue. The courts permit agents of the government to offer to a suspected person an opportunity to commit a crime, because otherwise many crimes, especially those involving contraband, could not otherwise be detected. The government has an interest only in apprehending those engaged in criminal activity by the mere offer of a neutral opportunity (*see Sorrells v. United States,* 287 U.S. 435, 441), not in the "manufacturing of crime." *Lopez v. United States,* 373 U.S. 427, 434 (1963). There is no governmental interest in intervening in contraband trade in such a way as to obtain any result other than an arrest based upon an opportunity. If the government supplies the contraband, then it is not acting within the bounds of its legitimate interest. As a matter of logic, supplying the contraband exceeds the bounds of that interest.

Thus, by exceeding the bounds of a legitimate governmental interest in supplying contraband that is the *sine qua non* of the offense, it would appear that conviction will be brought about through a method of law enforcement that offends a general sense of justice. In such an instance, the government has engaged in conduct that is expressly criminal, and would no doubt support a charge of conspiracy against government agents if they were acting in any other capacity. In *Rochin v. California,* 342 U.S. 165 (1952). This court concluded that the due process clause embodies the heritage of a legal tradition "so rooted in the . . . conscience of our people as to be ranked as fundamental," requiring that prosecutorial efforts respect certain decenies of civilized conduct. *Id.* at 169, 173. Law enforcement officials under the view expressed in *Rochin,* must conduct themselves within the confines of a "community sense of fair play and de-

cency," stopping short of actions which "discredit law," "brutalize the temper of a society," or shock the conscience of justice. *Id.* at 174, 172.

The evils that are sanctioned should this type of procedure be allowed wherein the government supplies contraband to an accused and then obtains a conviction based upon that contraband, promotes disobedience of the laws in order to punish, encourages law enforcement officials to participate in crimes, permits unrestricted ability of overzealous law enforcement agents selectively to set up defendants for prosecution, and ultimately results in a sham trial because the evidence has already been provided by the prosecution. Most assuredly, these evils result in an affront to basic notions of justice in violation of due process.

CONCLUSION

Petitioner contends that the decision of the Court of Appeals for the Eighth Circuit affirming his conviction should be reversed. Due process forbids Hampton's conviction in this instance if his version of the facts is true, and the jury should have been so instructed. This case should be remanded to the court of appeals with instructions to order the district court to grant Hampton a new trial.

Respectfully submitted

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No. 74-5822

In the Supreme Court of the United States

OCTOBER TERM, 1975

CHARLES HAMPTON, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (A. 107–114) is reported at 507 F. 2d 832.

JURISDICTION

The judgment of the court of appeals was entered on December 11, 1974. The petition for a writ of certiorari was filed on January 10 1975, and was granted on March 31, 1975. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the government is constitutionally barred from convicting a defendant for the sale of contra-

band that he procured from an informant or government agent.

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the Constitution in pertinent part provides:

> No person shall * * * be deprived of life, liberty, or property, without due process of law * * *.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of Missouri, petitioner was convicted on two counts of distributing heroin, in violation of 21 U.S.C. 841(a)(1). He was sentenced to concurrent terms of five years' imprisonment, to be followed by a three-year term of special parole on each count. The district court suspended imposition of the sentence and placed petitioner on probation for five years.[1] The court of appeals affirmed, one judge dissenting (A. 107–115).

1. The government's evidence showed that petitioner and Jule Hutton, a government informant, became acquainted at a tavern in St. Louis where the two frequently played pool. On February 25, 1974, while the two were at the tavern, petitioner told Hutton that he needed money, knew of a source of heroin, and would sell a certain quantity for $155. Hutton replied that he knew some potential buyers, whereupon petitioner asked him to "get in touch with those people and let me know what happens" (A. 6, 90). Hutton called Special Agent Terry Sawyer of the Drug Enforcement Administration and told him of his conversation with petitioner (A. 6),[2] and then reported to petitioner that a meeting had been arranged at 10:00 p.m. that evening with a buyer. Petitioner left the tavern and returned 10 or 15 minutes later, saying "everything [is] all right" (A. 6–7).

Petitioner and Hutton met Sawyer and another agent, James McDowell, at 10:00 p.m., at which time petitioner gave Sawyer a tinfoil packet of heroin (A. 8–9). After McDowell tested the drug for purity (A. 10), Sawyer paid petitioner.[3] Sawyer then asked about buying more heroin. Petitioner replied, "[y]ou can get better stuff if you [come] up with bigger money" (A. 73), and he gave Sawyer a telephone number at which he could be reached (A. 32–33).

On the following day, petitioner and Sawyer, by telephone, made arrangements for a second sale (A. 75–76). Petitioner persuaded Hutton to accompany him to the place where he was to meet Sawyer (A. 12–13, 76). At that meeting, petitioner once again gave Sawyer a tinfoil packet of heroin, which he offered to sell for $500.[4] After McDowell determined that the substance was in fact heroin, petitioner was arrested (A. 14, 33–35).

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[1] The term of probation was made to run concurrently with the remainder of a state term of 28 to 30 years' imprisonment petitioner was serving for armed robbery (Tr. 218). Petitioner had served four years of that sentence before escaping several months prior to his arrest in this case (A. 60–62).

[2] Hutton testified that at the time he had identified petitioner to Sawyer as "Michael Byers," an alias used by petitioner (A. 5–8).

[3] This was the transaction charged in Count 1.

[4] This transaction was charged in Count 2.

Petitioner's defense was based upon an alleged absence of *scienter*. He testified that Hutton had proposed the sale of a non-narcotic counterfeit drug, which Hutton would obtain from a friend, to gullible acquaintances who would be led to believe that they were buying heroin (A. 63–67). Petitioner claimed that they had successfully duped one buyer with fake drugs supplied by Hutton, and that he had urged Hutton to arrange another, similar transaction (A. 67–70). According to petitioner, Hutton several days later told him that he had more buyers in line and supplied him with tinfoil packets of what petitioner claimed to believe to be a merely counterfeit drug (A. 70–72, 77–79). As the court of appeals put it (A. 108–109), the buyers turned out to be Agents Sawyer and McDowell and the substance turned out to be heroin.

Petitioner testified that he neither intended to sell nor knew that he was selling heroin; he claimed that he thought he was dealing in "some kind of compound with pollutant in it" (A. 78–79). Petitioner also testified, however, that he had become addicted to heroin while in the military and remained addicted for at least three years after discharge (A. 59–61). His testimony further showed that he was well acquainted with the appearance of the drug and had had some contact with it during the several months between his escape from state prison and his arrest by the federal agents in this case.[5]

[5] Petitioner testified, "The heroin I have seen since I have been back, since I have been out of the penitentiary, has been brown. Before that it was usually white, a white powdery flour-like substance" (A. 87).

2. Petitioner did not request a standard entrapment instruction. Instead, petitioner asked the district court to charge the jury to acquit, regardless of his predisposition, if it found that the heroin he had sold to the agents had been supplied to him by Hutton (A. 104–105):

> The defendant asserts that he was the victim of entrapment as to the crimes charged in the indictment.
>
> If you find that the defendant's sales of narcotics were sales of narcotics supplied to him by an informer in the employ of or acting on behalf of the government, then you must acquit the defendant because the law as a matter of policy forbids his conviction in such a case.
>
> Furthermore, under this particular defense, you need not consider the predisposition of the defendant to commit the offense charged, because if the governmental involvement through its informer reached the point that I have just defined in your own minds, then the predisposition of the defendant would not matter.

The trial court refused the requested instruction (A. 95–96). The court did, however, submit to the jury the issue of *scienter* raised by petitioner's testimony, and the jury found petitioner guilty.

3. The court of appeals affirmed petitioner's conviction on the basis of *United States* v. *Russell*, 411 U.S. 423. The court reasoned that "the extent of Government participation in the commission of the crime, under the facts claimed by [petitioner, does not] warrant an entrapment defense based upon Government conduct, apart from * * * predisposition" (A. 112;

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507 F. 2d at 836).[6] Judge Heaney, dissenting, believed that petitioner's claim that the government supplied him with the contraband raised a due process defense, left open in *Russell,* based on "outrageous" governmental conduct (A. 114–115; 507 F. 2d at 837).

Because of a conflict among the courts of appeals on the question presented in this case,[7] and because the question is of considerable importance to effective law enforcement and affects a substantial volume of litigation, the United States did not oppose the petition for a writ of certiorari.

SUMMARY OF ARGUMENT

The rule petitioner contends for, that due process forbids conviction of a defendant for selling contraband he procured from the government, is precluded by this Court's decision in *United States* v. *Russell,*

[6] The court also noted that the trial judge did not err in failing to give the standard entrapment instruction based on predisposition since petitioner had never requested such an instruction, did not raise the issue on appeal, and, in any event, had conceded the existence of predisposition at oral argument (A. 113; 507 F. 2d at 836).

[7] The Court of Appeals for the Seventh Circuit has concluded, like the court below, that the supplying of contraband by a government agent does not constitute entrapment *per se* or otherwise bar the defendant's conviction. See *United States* v. *McGrath*, 494 F. 2d 562. Cf. *United States* v. *Johnson*, 484 F. 2d 165 (C.A. 9), certiorari denied, 414 U.S. 1112; *United States* v. *Rosner*, 485 F. 2d 1213 (C.A. 2). See also *United States* v. *Spivey*, 508 F. 2d 146 (C.A. 10), certiorari denied, April 28, 1975 (No. 74–5971). On the other hand, the Fifth Circuit has determined that, notwithstanding the *Russell* decision, "the law of this Circuit is that a defendant, where entrapment is an issue, may be acquitted for lack of predisposition, or, even though disposed, where the undercover agent supplies him with the contraband." *United States* v. *Mosley*, 496 F. 2d

411 U.S. 423. In that case the defendant was convicted for the illegal manufacture and sale of a drug he had made with a scarce chemical ingredient supplied by a government agent posing as a co-venturer in crime. Notwithstanding that the chemical was difficult for private individuals to obtain, and indispensable to defendant's crime, the Court ruled (411 U.S. at 432) that the government's conduct had fallen "far short" of violating the Due Process Clause.

This case is not constitutionally distinguishable from *Russell.* Petitioner does not claim, and, given his testimony, could not claim, that the government was his only source of heroin. Thus, the heroin allegedly supplied him was no more likely to result in the "manufacturing of crime" (Pet. Br. 21) than the chemical supplied in *Russell.* Nor is the fact that the heroin was a *"sine qua non"* (Pet. Br. 21) of petitioner's crime any basis for a distinction: in *Russell* this Court approved (411 U.S. at 432) the government's "supply of some item of value that the [defendant] requires * * *." Moreover, the provision of contraband is no more inducive to criminality than the provision of any other indispensable means, and the traditional entrapment defense in any event adequately protects the "otherwise innocent" (*Sorrells* v. *United States,* 287 U.S. 435, 448) against law enforcement practices that might overbear their will.

Adoption of the rule urged by petitioner would

1012, 1016. See also *United States* v. *Gomez-Rojas*, 507 F. 2d 1213 (C.A. 5); *United States* v. *Oquendo*, 490 F. 2d 161 (C.A. 5); *United States* v. *Bueno*, 447 F. 2d 903 (C.A. 5). The Third Circuit has now apparently joined the Fifth in this view. See *United States* v. *West*, 511 F. 2d 1083.

gravely impair the government's ability to enforce the narcotics laws. Illegal narcotics transactions are difficult to detect. Undercover activity was recognized in *Russell* (411 U.S. at 432) as "the only practicable means of detection." A constitutional proscription against the provision of contraband would improperly afford narcotics traffickers a ready means of testing prospective confederates.

Accordingly, governmental furnishing of contraband cannot be a *per se* defense; in any given case, it is merely one fact to be considered with others in connection with the defense of entrapment. Moreover, an unyielding constitutional rule here would ignore the variety of circumstances under which the government may be said to "supply" contraband. In rare cases a government agent may furnish contraband directly. But in most cases the government will have no knowledge of the defendant's source of contraband. Indeed, that appears to be the case here. If a defendant procures contraband from an informant who is acting without the knowledge or approval of the government, there clearly is no basis for requiring an acquittal.

ARGUMENT

THE GOVERNMENT IS NOT CONSTITUTIONALLY BARRED FROM CONVICTING A DEFENDANT FOR SELLING CONTRABAND THAT HE PROCURED FROM AN INFORMANT OR GOVERNMENT AGENT

The issue presented here is best understood in the context of this Court's decision in *United States* v. *Russell,* 411 U.S. 423. In *Russell,* an undercover narcotics agent had furnished the defendant with phenyl-

2-propanone, an essential ingredient in the manufacture of methamphetamine, in return for a portion of the methamphetamine that the defendant produced; the defendant was then prosecuted for the unlawful manufacture and sale of that methamphetamine. The defendant, who conceded that he had been predisposed to commit the charged offenses, nevertheless contended that the government's participation in the illegal enterprise was such as to require his acquittal. This contention rested upon two alternative theories: that the nonconstitutional defense of entrapment should rest exclusively upon the type and degree of governmental conduct, without regard to the defendant's predisposition to commit the charged offense, and that due process precludes conviction of a defendant to whom the government has furnished means indispensable to the commission of the crime.

This Court rejected both theories. With respect to the defendant's argument concerning the proper scope of the nonconstitutional defense of entrapment, the Court reaffirmed its prior holdings in *Sorrells* v. *United States,* 287 U.S. 435, and *Sherman* v. *United States,* 356 U.S. 369, that "the principal element in the defense of entrapment [is] the defendant's predisposition" (411 U.S. at 433). As to that issue, the Court concluded that the "[r]espondent's concession * * * that the jury finding as to predisposition was supported by the evidence is, therefore, fatal to his claim of entrapment" (411 U.S. at 436).

The respondent's due process argument in *Russell* was similarly rejected (411 U.S. at 431–432):

> While we may some day be presented with a situation in which the conduct of law enforce-

> ment agents is so outrageous that due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction, cf. *Rochin* v. *California,* 342 U.S. 165 (1952), the instant case is distinctly not of that breed. * * * The law enforcement conduct here stops far short of violating that "fundamental fairness * * *" mandated by the Due Process Clause of the Fifth Amendment. *Kinsella* v. *United States ex rel. Singleton,* 361 U.S. 234, 246 (1960).

In this case, petitioner has conceded both that he was predisposed to traffic in heroin (A. 113, n. 5; 507 F. 2d at 836, n. 5) and, in view of *Russell,* that this case "is not to [be] regard[ed] * * * as an entrapment case at all" (Pet. Br. 17). Petitioner rests his case entirely upon a claimed denial of due process: he contends that where an informant or government agent has furnished a defendant with the contraband that he is indicted for subsequently selling, "due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." For the reasons we discuss below, we disagree.[8]

[8] One of petitioner's arguments can be disposed of at the outset. He appears to argue (Pet. Br. 18–20) that to convict a defendant for the sale of contraband that he procured from an informant or other government agent entails a constitutionally impermissible presumption "that the accused would commit a similar offense in the future" (Pet. Br. 19). That argument is without substance; there was no unconstitutional presumption here. Even if, as petitioner claims, an informant or government agent furnished him with the heroin that he was convicted for having sold, his conviction nevertheless rested not upon any constitutionally impermissible presumption about crimes that he might commit in the future but rather upon conclusive evidence that he already had committed a particular crime.

By way of preface, however, we begin with a few words regarding the relationship between the instant case and the doctrine of entrapment as it has evolved in federal law. This is not, as petitioner soundly concedes, an entrapment case. The doctrine of entrapment is concerned with the evil of government conduct that "plays on the weaknesses of an innocent party and beguiles him into committing crimes which he otherwise would not have attempted." *Sherman* v. *United States, supra,* 356 U.S. at 376. That much was common ground shared by the majorities in *Sherman* and *Sorrells* and the concurrences of Justices Roberts and Frankfurter. The sole ground of disagreement involved whether an objective or subjective standard should be employed in gauging the success of the wrongdoer's entrapment defense.

At bottom, petitioner's argument on this point is indistinguishable from the contention that to deny the defense of entrapment to a defendant who, like petitioner, was predisposed to commit the offense with which he was charged denies due process by permitting conviction merely for a criminal propensity. But that contention was rejected by this Court in *Russell.* Due process principles are not violated by making the availability of the defense of entrapment turn upon the defendant's predisposition: although the absence of any criminal propensity may in some cases serve to sustain an entrapment defense, in no case is a defendant convicted merely upon proof of criminal propensity; a conviction ultimately rests not upon the defendant's predisposition toward crime, or upon any speculation or presumption with regard to the probability that he may turn to crime in the future, but upon proof beyond a reasonable doubt that he in fact committed the specific crime charged in the indictment.

Petitioner here seeks recognition of an absolute defense based on the presence of a single fact, the provision of contraband by a person who has some connection with the government. Regardless of the approach by which such an action is to be evaluated, all members of both the *Sorrells* and the *Sherman* Court would surely have agreed that, by itself, the supplying of contraband could not possibly create the least risk of inducing to criminal acts those "who would normally avoid crime and through self-struggle resist ordinary temptations." *Sherman* v. *United States, supra,* 356 U.S. at 384 (concurring opinion of Mr. Justice Frankfurter). What this Court must evaluate in this case, in other words, is law enforcement conduct that, while useful for apprehending the "unwary criminal," poses no risk of trapping the "unwary innocent" (356 U.S. at 372).

We turn now to the discussion of whether the provision of contraband by government agents or informants, although not implicating the essential concerns underlying the traditional defense of entrapment, is nevertheless otherwise so offensive to notions of essential fairness that wrongdoers should be afforded a defense on the basis of the presence of such conduct.

A. THE FURNISHING OF CONTRABAND IS NOT CONSTITUTIONALLY DISTINGUISHABLE FROM THE FURNISHING OF ANY OTHER MEANS INDISPENSABLE TO THE COMMISSION OF THE OFFENSE

The protections of due process that petitioner attempts to invoke here serve to ensure that the individual, in his relations with the state, will not be treated unfairly, in a manner "shocking to the universal sense of justice." *Kinsella* v. *United States ex rel. Singleton,* 361 U.S. 234, 246. But petitioner has failed to demonstrate that a conviction resulting from governmental furnishing of contraband to him in the circumstances of this case would be fundamentally unfair.

If petitioner is to prevail in this case, he must draw a constitutionally significant distinction between the governmental conduct alleged here, *i.e.,* the furnishing by an informant of the contraband petitioner is charged with having sold, and the conduct at issue in *Russell, i.e.,* the furnishing by a government agent of a means indispensable to the commission of the offense there charged. This petitioner has not done and cannot do.

The only relevant distinction between the heroin allegedly supplied here and the phenyl-2-propanone supplied in *Russell* is that heroin is contraband whereas phenyl-2-propanone is not. It is upon this distinction that petitioner, at bottom, relies. But it is a distinction without any constitutional force, for it does not significantly bear upon the likelihood that an otherwise law-abiding individual will be unfairly inveigled by the government into the commission of a crime; it does not bear upon the fundamental fairness of the criminal investigation and subsequent prosecution.

It is, of course, clear that no constitutional distinction can be drawn between contraband and noncontraband on the basis of relative obtainability. The "unfairness" alleged in *Russell* lay in the fact that phenyl-2-propanone, although a lawful substance, was difficult to obtain, and therefore that the defendant probably would not have been able to commit the specific offense

charged in the indictment but for the governmental furnishing of the chemical. But the countervailing fact deemed controlling by the Court was that since phenyl-2-propanone was not actually otherwise unobtainable, the absence of any governmental furnishing would not have precluded the defendant from committing other similar offenses. See also *Lewis* v. *United States,* 385 U.S. 206; *Osborn* v. *United States,* 385 U.S. 323. That reasoning is fatal to petitioner's claim here. Petitioner does not assert that he would have incurred any greater difficulty in procuring heroin from nongovernmental sources than the defendant in *Russell* faced in independently obtaining phenyl-2-propanone. Any such assertion would, moreover, have rung conspiciously false in view of petitioner's testimony concerning his lengthy heroin addiction and his admission that he had had access to heroin during the months immediately preceding his arrest (see p. 4, *supra*). It was, therefore, no more unfair for the government to convict petitioner after furnishing him with heroin, if that is in fact what occurred, than for it to convict in *Russell* after furnishing phenyl-2-propanone to the defendant there.[9]

Nor may any constitutional distinction be drawn between the furnishing of contraband and the furnishing of noncontraband on the basis of their respective likelihoods of "manufacturing * * * crime" (Pet. Br. 21). Indeed, petitioner does not even suggest that governmental provision of contraband is more "crime-creating" than the provision of any other indispensable means. Instead, he rests upon the broad contention that due process bars conviction wherever the government has supplied "the *sine qua non* of the offense" (Pet. Br. 21). But that contention was expressly rejected in *Russell,* where the Court refused to adopt "a rigid constitutional rule that would preclude any prosecution when it is shown that the criminal conduct would not have been possible had not an undercover agent 'supplied an indispensable means to the commission of the crime'" (411 U.S. at 431). Instead, the Court held that (411 U.S. at 432) "the supply of some item of value that the drug ring requires must, as a general rule, * * * be permissible" and that (411 U.S. at 435) "'* * * the fact that officers or employees of the Government merely afford opportunities or facilities for the commission of the offense does not defeat the prosecution * * *.'" See also *Sorrells* v. *United States, supra,* 287 U.S. at 441; *Sherman* v. *United States, supra,* 356 U.S. at 372.

Of course, the governmental provision of any indispensable means to an individual who is criminally predisposed may lead to the commission of a particular crime that would not otherwise have been committed. In *Russell,* for example, the defendant would not have engaged in the particular manufacture and sale of methamphetamine for which he was convicted but for

[9] It may well be that convictions resulting from the furnishing of an indispensable means are constitutionally impermissible where the means in question was otherwise wholly unobtainable by the particular defendant. But obtainability, regrettably, does not turn upon whether the "facilities" are or are not contraband. Neither, therefore, should any constitutional rule.

the governmentally supplied phenyl-2-propanone. But law enforcement tactics that result in the commission of a particular crime by one criminally predisposed are not impermissibly crime-creating: the teaching of *Russell* is that there is no denial of due process, and no unfairness, where the government convicts a defendant who, like petitioner, has attempted to exploit a perceived opportunity, created by the government, to satisfy his own pre-existing criminal propensities.[10]

Furthermore, we see no reason, and petitioner suggests none, for believing that the provision of contraband would be significantly more likely to induce crime than the furnishing of other indispensable means. Otherwise innocent persons are unlikely to be led into crime by informants or undercover agents posing as narcotics suppliers. But to the extent that governmental furnishing of contraband might induce the commission of an offense by one "who would normally avoid crime and * * * resist ordinary temptations" (*Sherman* v. *United States, supra,* 356 U.S. at 384), it is already protected against by the defense of entrapment. That defense bars conviction for commission of a crime by an individual who, because lack-

[10] Moreover, the particular offense that may result from the provision of contraband occurs in a governmentally monitored setting in which there is little likelihood that the contraband may escape through private channels to be used for anti-social purposes. The practice of providing contraband, or any other indispensable means, is therefore no more "crime-creating" than the medical practice of innoculation is "disease-creating": it is a tactic that is designed to prevent or terminate an entire course of criminal dealings by the expedient of facilitating the commission of a particular offense in controlled surroundings.

ing criminal predisposition, "would not have perpetrated [the offense] except for the trickery, persuasion, or fraud of the officer." *Sorrells* v. *United States, supra,* 287 U.S. at 454 (concurring opinion of Mr. Justice Roberts).

In short, the law enforcement tactic of furnishing contraband poses no risk for law-abiding individuals, and convictions of criminally predisposed individuals resulting from such furnishing are not unfair *per se.* Moreover, for reasons that we now discuss, governmental provision of contraband in some circumstances may be necessary to effective criminal enforcement of the narcotics laws.

B. THE RULE FOR WHICH PETITIONER CONTENDS COULD SIGNIFICANTLY HAMPER ENFORCEMENT OF THE NARCOTICS LAWS

1. Governmental furnishing of contraband may in some circumstances be necessary to effective law enforcement

The peculiar nature of the illicit narcotics trade requires the use by the government of special investigatory techniques. Since narcotics offenses are "victimless crimes" (in the narrow sense of the phrase), there is seldom any injured party likely to bring a complaint; members of the general public are rarely in a position to assist law enforcement authorities in ferreting out narcotics violators; narcotics transactions normally are shrouded in secrecy; at a distance, illicit sales are difficult to distinguish from innocent conversations; and evidence is easily destroyed. See Bancroft, *Administration of the Affirmative Trap and the Doctrine of Entrapment: Device and Defense,* 31 U. Chi. L. Rev. 137, 140 (1963). For these reasons,

ordinary techniques of surveillance and investigation have been found to be ineffective in enforcing the narcotics laws; resort to undercover agents and informants has proved to be indispensable to enforcement. Narcotics offenses are committed "under such circumstances that perpetrators might never be discovered if government representatives were not permitted to participate to some extent." *Whiting* v. *United States*, 321 F. 2d 72, 76 (C.A. 1), certiorari denied, 375 U.S. 884. See also *Osborn* v. *United States*, *supra*.

Undercover investigation of illegal narcotics enterprises may often require the government to furnish facilities for the commission of crime; an undercover agent may, for example, be required to furnish money, tools, or a car, or allow the use of his premises to plan the crime. See, *e.g.*, *Johnson* v. *United States*, 317 F. 2d 127 (C.A.D.C.). This Court explicitly sustained the constitutionality of that practice in *Russell* (411 U.S. at 432):

> The illicit manufacture of drugs is not a sporadic, isolated criminal incident, but a continuing, though illegal, business enterprise. In order to obtain convictions for illegally manufacturing drugs, the gathering of evidence of past unlawful conduct frequently proves to be an all but impossible task. Thus in drug-related offenses law enforcement personnel have turned to one of the only practicable means of detection: the infiltration of drug rings and a limited participation in their unlawful present practices. Such infiltration is a recognized and permissible means of investigation; if that be so, then the supply of some item of value that the drug ring requires must, as a general rule, also be permissible. For an agent will not be taken into the confidence of the illegal entrepreneurs unless he has something of value to offer them. Law enforcement tactics such as this can hardly be said to violate "fundamental fairness" or [be] "shocking to the universal sense of justice" * * *.

The "item of value" required to be furnished may in some situations be contraband: the governmental provision of contraband may, in a given case, be the only practicable means of gaining the confidence of the participants in the illegal enterprise. Cf. *United States* v. *McGrath*, *supra*. We see no constitutional basis for depriving law enforcement authorities of that means.

Moreover, the rule petitioner proposes—that no defendant can be convicted for selling contraband that he procured from an informant or other government agent—would not merely interfere with some affirmative efforts at infiltration. The adoption of that rule could undermine narcotics enforcement efforts generally by providing a means by which all undercover agents could be detected and neutralized. A constitutional rule that effectively forbade the governmental furnishing of contraband could quickly be converted by narcotics traffickers into a sword rather than merely a shield: prospective confederates could be tested by requiring that they furnish contraband for the carrying on of the illegal enterprise. The particular *per se* rule proposed by petitioner therefore

represents a manifestly inappropriate balance between, on the one hand, society's legitimate interest in the detection and prevention of serious criminal activities and, on the other, the interest of potential or actual criminals in having law enforcement authorities "play fair."

2. There is no basis for the promulgation of a broad defense based upon the defendant's source of supply

In view of the facts that contraband is not *per se* more diffiicult to obtain than other indispensable criminal means, that the furnishing of contraband is no more likely to induce crime than the furnishing of other means, and that the governmental furnishing of contraband is a highly useful and in some cases necessary law enforcement technique, it is, we believe, clear that there is no constitutional basis for the broad defense urged by petitioner.

To the contrary, if an general rule is to govern this area of the law, it is that the governmental furnishing of contraband is merely one fact to be considered in connection with the standard defense of entrapment. That rule would adequately protect against unfair law enforcement tactics that might threaten to overbear an otherwise innocent individual's will, while preserving the government's legitimate interest in effective criminal enforcement of the narcotics laws.

a. Certainly this is not an area of the law where a rigid due process defense would be appropriate. The factual circumstances in which a government agent, or an informant acting with the sanction of

the government, furnishes contraband in connection with the infiltration of a narcotics ring are too varied to make appropriate the application of a rigid, one-dimensional due process rule. The situation to which petitioner's argument appears to be addressed is that where the government, acting through a government agent or familiar, paid informant, arranges to provide a suspect with the narcotics that it has also arranged, through other undercover agents, to purchase from him. That is, in fact, a comparatively rare situation,[11] although, for the reasons stated throughout this brief, we submit that a conviction based upon such a purchase, from an individual predisposed to traffic in narcotics, does not contravene the requirements of due process. But even if such investigative techniques were determined to be fundamentally unfair—and we reiterate that in our view they are not—there are many other not uncommon situations in which the indirect governmental furnishing of contraband, through an informant, would, we believe, remain entirely proper.

For example, in some cases individuals who have been requested by narcotics traffickers to transport contraband have voluntarily divulged the facts concerning the illegal enterprise to government agents and then completed delivery under governmental

[11] We have been informed by the Drug Enforcement Administration that prior approval of direct governmental furnishing of contraband must be obtained from both the United States Attorney and the Administration's Assistant Administrator for Enforcement, that approval is granted only in connection with efforts to infiltrate known criminal activities, and that approval was granted only twice during 1974.

supervision. See, *e.g.*, *United States* v. *Arias-Diaz*, 497 F. 2d 165 (C.A. 5); *United States* v. *Register*, 496 F. 2d 1072 (C.A. 5). In others, couriers may offer to become informants and to continue transportation of the narcotics after being apprehended *en route*. Cf. *United States* v. *Kohn*, 365 F. Supp. 1031 (E.D. N.Y.), affirmed *per curiam*, 495 F. 2d 763 (C.A. 2); *United States* v. *Mitchell*, Cr. No. 74–H–179, decided November 26, 1974 (S.D. Texas) (defendant's supplier became an informant only after furnishing the contraband). In still other cases, events may have intervened so as to break the connection between the governmental furnishing of contraband and the narcotics transaction for which the defendant is ultimately tried. See *United States* v. *Ramey*, Cr. No. 73–H–389, decided November 8, 1974 (S.D. Texas). These varied cases cannot be made to lie in the same Procrustean bed, unless the result would be to sustain the propriety of the official conduct in each.

b. Moreover, it is our belief that the majority of cases in which a defendant has sold contraband that he will claim to have procured from an informant will be cases in which the informant's alleged furnishing of narcotics was not known to the government. Indeed, this is just such a case. The government's evidence directly contradicted petitioner's testimony that he was furnished heroin by the informant, Hutton, and there is no evidence anywhere in the record that even suggests that the investigating government agents had any knowledge concerning petitioner's source of supply. Petitioner's requested instruction (see p. 5, *supra*), which is similar to the one

now given in the Fifth Circuit (see n. 7, *supra*), would require acquittal in his case and in all such similar cases.[12] That result is manifestly incorrect.

The government exercises little control over the activities of many of its informants and may have little knowledge about the extent to which they may operate as narcotics suppliers and no knowledge of particular sales. Although the government may not "disown" the successful blandishments or inducements of an informant (*Sherman* v. *United States*, *supra*, 356 U.S. at 373), not all the conduct of an informant may appropriately be imputed to the government. Certainly where an informant illegally, without the knowledge and approval of a government agent, acts as a drug supplier, the government cannot fairly be regarded as "involved" in the furnishing of contraband. We can conceive of no consideration of public policy that would justify acquitting a defendant on the ground that his supplier was an informant whose illicit activities were unknown to the government.

Such an acquittal would be clearly incompatible with this Court's decision in *Russell*. In that case, a government agent supplied the phenyl-2-propanone necessary to the manufacture of methamphetamine, was present during, and incidentally participated in,

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[12] Moreover, the instruction actually given in the Fifth Circuit (and this presumably is implicit in petitioner's requested instruction as well) places upon the government the burden of proving that the contraband the defendant is charged with having sold was not procured from an informant—even where the government may in fact have no knowledge concerning the defendant's source of supply. See *United States* v. *Mosley*, *supra*.

the manufacture, and purchased a portion of the final product. This Court expressly rejected the claim that those facts revealed "an intolerable degree of governmental participation in the criminal enterprise" (411 U.S. at 427). A *fortiori*, the more extravagant claim embodied in petitioner's requested instruction—that even the comparatively less comprehensive involvement of a mere informant whose actions are not known to or sanctioned by the government entails impermissible governmental participation in the crime—must also be rejected.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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